

UNIVERSITY OF ST. MICHAEL'S COLLEGE



3 1761 02159967 5



the presence of this book

in

the J.M. Kelly library
has been made possible
through the generosity

of

Stephen B. Roman

From the Library of Daniel Binchy

JA

66

.VJ



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

OUTLINES OF

HISTORICAL JURISPRUDENCE

VOLUME II

JURISPRUDENCE OF THE GREEK CITY

In preparation:

VOLUME III: THE MEDIAEVAL JURISPRUDENCE
OF WESTERN CHRISTENDOM

OUTLINES
OF
HISTORICAL
JURISPRUDENCE

BY

SIR PAUL VINOGRADOFF, F.B.A.

CORPUS PROFESSOR OF JURISPRUDENCE IN
THE UNIVERSITY OF OXFORD

Volume Two

The Jurisprudence of the Greek City



OXFORD UNIVERSITY PRESS
LONDON EDINBURGH GLASGOW COPENHAGEN
NEW YORK TORONTO MELBOURNE CAPE TOWN
BOMBAY CALCUTTA MADRAS SHANGHAI
HUMPHREY MILFORD

1922

Printed in England

TO THE MEMORY
OF
RODOLPHE DARESTE



PREFACE

It may not be amiss to state from the outset what will be attempted in this volume and what remains outside its scope. The subject treated is not Greek positive law in all its bearings, but the Greek jurisprudence of the epoch when democracy prevailed in the leading cities.

One of the Nestors of Hellenic studies, Dareste, had this distinction in view when he dedicated a book to the Science of law in Greece (*La Science du droit en Grèce*). But instead of tracing, as he might well have done, the application of juridical doctrines in the institutes of positive law, he contented himself with presenting a sketch of the teaching of Plato, Aristotle, and Theophrastos.

And yet it might be said that we actually possess in a fragmentary form the elements of Greek jurisprudence. They are set out in the writings of Aristotle and of his school—not so completely as the comparative politics of the period, but with sufficient definiteness and clearness. The well-known chapters of the *Ethics*, the *Rhetoric*, the *Politics*, the treatise on the *Athenian Constitution*, supply precious indications as to the way in which the various rules of substantive law and of procedure, illustrated by inscriptions and speeches, were connected in the minds of philosophers of the fourth century into a system of city-law. Some of the rules have disappeared, some of the applications appear problematical or contradictory, but on the whole the Aristotelian teaching on Political Science makes it possible to treat the details of Greek law as the ramifications of philosophical and juridical principles conditioned by the development of City-commonwealths. Greek juridical theory was undoubtedly connected with actual practice of Courts and Assemblies. There is no lack of books on general jurisprudence nowadays: why should we not try to reconstitute the general jurisprudence of the fourth century B. C.?

Another preliminary warning is suggested to me by some of the criticisms—generally kind and pertinent—called forth by the first volume of the *Outlines*. In that volume I restricted my field of observation as much as possible to a comparative study of Indo-European legal antiquities, called for the sake of brevity Aryan antiquities. The only exception allowed was the use of ethnological materials from various racial surroundings to characterize the elements of the family, for which Aryan culture does not provide sufficiently primitive examples. But I purposely avoided including within the range of comparison the data of Semitic or Babylonian history, not because I ignored the importance of Hammurabi's legislation or of Babylonian inscriptions, but because I did not want to lose my way in the maze of extremely different Social situations. The Aryan group seemed wide enough for a more or less definite statement of tribal institutions. In the same manner in this volume I have abstained from plunging into the immense sources of materials opened up for the Hellenistic period in papyri and inscriptions. It is with the City of the fifth and fourth centuries that I have to deal, and not with the equally interesting manifestations of Greek genius in Egypt and Hellenistic Asia. By way of exception I have referred to a few inscriptions of the third and second centuries B.C. because they presented some characteristic institutions with particular clearness, but I have renounced with regret any idea of following in the footsteps of Grenfell and Mitteis.

The fact that I refer seldom to Roman law will be easily understood ; the subject has been treated so often and so well that any one who wants to institute comparisons can easily do so by turning to the works of the well-known masters of the study.

It remains for me to acknowledge with sincere gratitude the advice and assistance of kind friends—Prof. J. A. Smith, Prof. J. L. Myres, Prof. De Zulueta, Mr. C. K. Allen, of University College, and Miss M. F. Moor, of Somerville College, Oxford. I am indebted to Miss Moor for the compilation of the Index.

TABLE OF CONTENTS

CHAPTER	PAGE
I. INTRODUCTION	
1. Unity of Greek Law	1
2. The Social Type	12
II. THE CONCEPT OF LAW	
1. Popular Notions	18
2. The Critical Analysis of the Sophists .	25
3. The Justification of Law	31
III. THE LEGAL SYSTEM	
1. Preliminary Notions	43
2. Corrective Justice	45
3. Distributive Justice	51
4. Justice in general	57
5. Fairness (<i>ἐπιείκεια</i>)	63
IV. THE SOURCES OF LAW	
1. Enactments	72
2. Custom	75
3. Authority of Precedents	78
4. Voluntary Jurisdiction	81
V. THE STRUCTURE OF THE CITY	
1. The Federation of Kindreds	85
2. The Household	91
3. The City and Religion	96
VI. THE CITY AND THE CITIZEN	
1. The City as a Juridical Person	102
2. The Rule of Law	113
3. The Privileges of Citizens	116
4. Societies and Unions	119
VII. THE LAW OF THE CONSTITUTION	
1. The Deliberative Functions of the People	128
2. Control of the Administration	140
3. Judicial Functions of the People	143

CHAPTER	PAGE
VIII. RELATIONS BETWEEN CITIES	
1. International Law and the Right of Reprisals	153
2. The granting of justice (<i>δωσιδικία</i>)	156
IX. CRIME AND TORT	
1. Penal actions	165
2. Archaic forms of Criminal Procedure	177
3. The Elements of Crime	182
4. Punishment	188
5. Actions in Tort	191
X. PROPERTY AND POSSESSION	
1. General Terms and Distinctions	197
2. The Public Element in Property	202
3. Private Appropriation	212
4. Rights and Remedies in Land Law	218
XI. CONVENTIONS AND TRANSACTIONS	
1. Form and Substance in Conventions	230
2. The Enforcement of Obligations	245
3. Lease and Sale	255
BOOKS REFERRED TO IN VOL. II	267
INDEX	277

THE JURISPRUDENCE OF
THE GREEK CITY



CHAPTER I

INTRODUCTION

1. *Unity of Greek Law.*

ANCIENT writers have often called attention to the great change effected in the history of civilization by the advance from tribal conditions to city organization. Plato summarizes in the *Laws*¹ the received view as to tribal lordships (*δυναστεῖαι*) which still existed in backward countries, and had sprung from patriarchal communities like the one described by Homer in his account of the *Kyklopes*. "Did not such States arise out of single settlements and kindreds scattered and weakened by destructive misfortunes in the course of which the eldest became the ruler? With them government originated in the authority of a father and a mother, whom, like a flock of birds, they followed, forming one troop under the patriarchal rule and sovereignty of their parents." Thukydides in his introductory chapters describes the contrast between the migrations of Greek tribes during the early period and the final settlement in cities. "The country which is now called Hellas was not regularly settled in ancient times. The people were migratory, and readily left their homes whenever they were overpowered by numbers. There was no commerce, and they could not safely hold intercourse with one another by land or by sea. The several tribes cultivated their own soil just enough to obtain a maintenance from it. But they had no accumulations of wealth, and did not plant the ground permanently; for, being without walls, they were never sure that an

Tribal
Life and
Cities.

¹ *Laws* III, 680 b d e δοκοῦσί μοι πάντες τὴν ἐν τούτῳ τῷ χρόνῳ πολιτείαν δυναστείαν καλεῖν, ἣ καὶ νῦν ἔτι πολλαχοῦ καὶ ἐν Ἑλλήσι καὶ κατὰ βαρβάρους ἐστίν· λέγει δ' αὐτὴν πον καὶ Ὅμηρος γεγρονέναι περὶ τὴν τῶν Κυκλώπων οἰκησιν . . . μῶν οὖν οὐκ ἐκ τούτων τῶν κατὰ μίαν οἰκησιν καὶ κατὰ γένος διεσπαρμένων ὑπὸ ἀπορίας τῆς ἐν ταῖς φθοραῖς, ἐν αἷς τὸ πρεσβύτατον ἄρχει διὰ τὸ τὴν ἀρχὴν αὐτοῖς ἐκ πατρὸς καὶ μητρὸς γεγρονέναι, οἷς ἐπόμενοι καθάπερ ὄρνιθες ἀγέλην μίαν ποιήσουσι, πατρονομούμενοι καὶ βασιλείαν πασῶν δικαιοτάτην βασιλευόμενοι;

invader might not come and despoil them. Living in this manner and knowing that they could obtain a bare subsistence anywhere, they were always ready to emigrate; so that they had neither great cities nor any considerable resources."¹

Political thinkers laid stress on the immense advantages of constant intercourse and close co-operation, which induced citizens to forgo the superficial greatness arising from huge numbers and extensive territory. Aristotle emphasizes the transition from tribal villages to cities, as a necessary condition of welfare. "When several households are united and the association aims at something more than the supply of daily needs, then the village comes into existence. And the most natural form of the village appears to be that of a colony of the household. . . . When several villages are united in a single community perfect and large enough to be nearly or quite self-sufficing, the State comes into existence—originally for the sake of mere life, but continuing in existence for the sake of good life."²

"It is further asked: When are men, living in the same place, to be regarded as a single city—what is the limit? Certainly not the wall of the city, for you might surround all Peloponnesos with a wall. But a city, having such a vast circuit, would contain a nation rather than a State, like Babylon, which, it is said, had been taken for three days before some part of the inhabitants became aware of the fact."³

The older *jus civile* of Rome as well as the law of Greek States presents combinations of legal rules which depend on one dominant fact—the nature of the city commonwealth (πόλις); let us try to determine the balance of juridical

¹ THUK. I, 2.

² AR. Pol. I, 2, 1252 b 15 ἡ δ' ἐκ πλείονων οἰκιῶν κοινωμία πρώτη χρήσεως ἕνεκεν μὴ ἐφημέρου κώμη. μάλιστα δὲ κατὰ φύσιν ἔοικεν ἡ κώμη ἀποικία οἰκίας εἶναι. . . . ἡ δ' ἐκ πλείονων κωμῶν κοινωμία τέλειος πόλις, ἥδη πάσης ἔχουσα πέρας τῆς αὐταρκείας ὡς ἔπος εἰπεῖν, γυνομένη μὲν οὖν τοῦ ζῆν ἔνεκεν, οὐσα δὲ τοῦ εἶναι ζῆν. (Cf. Jowett.)

³ *Ibid.* III, 3, 1276 a 24 ὁμοίως δὲ καὶ τῶν τὸν αὐτὸν τόπον κατοικούντων ἀνθρώπων τότε δεῖ νομίζειν μίαν εἶναι τὴν πόλιν. οὐ γὰρ δὴ τοῖς τείχεσιν εἴη γὰρ ἂν Πελοποννήσῳ περιβαλεῖν ἐν τείχος. τοιαυτὴ δ' ἴσως ἐστὶ καὶ Βαβυλῶν καὶ πᾶσα ἣτις ἔχει περιγραφὴν μᾶλλον ἔθνους ἢ πόλεως ἧς γέ φησιν ἑλωκίας τρίτην ἡμέραν οὐκ αἰσθῆσθαι τι μέρος τῆς πόλεως. (Cf. Jowett.)

principles in this stage of development, taking as our text not the much studied *jus Quiritium* but the less familiar law of Greek States. In spite of many drawbacks, the latter has the great advantage that it can be more clearly imagined as existing on one plane, namely, in the stage of the City Commonwealth, while the law of Rome gradually becomes the law of an Empire, and loses its municipal complexion.

A perplexing problem presents itself at the very outset: are we justified in speaking of Greek law? Does such a thing exist? In other words, can Greek law be treated as a unity in spite of the fact that there were more than a hundred independent cities, each with its own laws? Had we not better speak of Athenian, Lakedaimonian, Kretan, Boiotian, Korinthian law? The contrast between centralized Roman jurisdiction and the autonomous law-building commonwealths of Hellas seems to involve the hopeless task of inquiring into countless local varieties of jurisprudence. No very wide acquaintance with the material is needed, however, in order to perceive that, in a general sense, there is good reason to treat of Greek law as such, and to analyse the contents of this great unity. The Greeks themselves were conscious of a number of institutions and customs which were peculiar to them and bound them together in contrast with the barbarians.

When citizens of divers Greek states met abroad, and were obliged to stand together against foreigners, they established common legal arrangements without difficulty; consider, for instance, the evidence from Naukratis in Lower Egypt. We are told that in the seventh century B. C. members of many different Greek States recognized and appreciated common ties and common institutions.

Naukratis was originally a Milesian colony,¹ founded about 650 B. C.; it was reconstituted in 570 B. C. by Amasis, who, as Herodotos tells us, was a "philhellene," and gave the town to the Greeks for their use as a trading *dépôt*.² The site contained a sanctuary dedicated to "the Gods of

Conscious-
ness of
national
unity.

¹ STRABO XVII, p. 801.

² D. G. HOGARTH, *Journal of Hellenic Studies* XXV, "Naukratis", pp. 105 ff; H. PRINZ in *Klio*, Suppl. VII (*Funde aus Naukratis*).

the Hellenes" as well as temples of individual deities, such as Aphrodite, Artemis, and others. One building, called the Hellenion, was the common sanctuary of nine Greek cities, both Ionian and Dorian; their names are given by Herodotos, who also informs us that these nine cities elected the overseers of the mart.¹ There were also sanctuaries of Apollo, Hera, and Zeus belonging respectively to the Milesians, Samians, and Aiginetans. Judging by the types of pottery found on the spot, it is probable that the Greek settlement was in existence in the seventh century, but the finds from the Hellenion are less archaic, and the evidence goes to show that this was built when the town was re-settled by Amasis in 570 B.C. The development of this colony is a striking instance of the common action of Greeks of different races and cities in the early period in regard to religious, commercial, and legal custom.

The "common law" of Greece.

In the fifth century B.C. the numerous treaty-arrangements as to reciprocity in the administration of justice (*σύμβολα*), and the levelling practice of Athenian courts during the sway of the first Athenian League, did much to produce uniformity of legal procedure and of substantive law in the Hellenic world. The Athenians were by no means solely responsible for the growth of a common system. In the fourth century we find that as regards contracts and commercial relations the Greeks came to look upon the laws of the various cities as fundamentally similar, so that Demosthenes could say: "Have we not all the same laws and the same justice as regards commercial cases?"² Isokrates' Aiginetic speech deals with a case of disputed succession, and shows that the law of three separate States

¹ HERODOTOS II, 178 φιλέλλην δὲ γενόμενος ὁ Ἄμασις . . . τοῖσι ἀπικνευμένοισι ἐς Αἴγυπτον ἔδωκε Ναύκρατιν πόλιν ἐνοικήσαι· τοῖσι δὲ μὴ βουλομένοισι αὐτῶν οἰκέειν, αὐτοῦ δὲ ναυτιλλομένοισι, ἔδωκε χώρους ἐνιδρύσασθαι βωμῶν καὶ τεμένεα θεοῖσι· τὸ μὲν νῦν μέγιστον αὐτῶν τέμενος, καὶ ὀνομαστότατον ἐὼν καὶ χρησιμώτατον, καλούμενον δὲ Ἑλλήνιον, αἶδε πόλιές εἰσι αἱ ἰδρυμένααι κοινῇ· Ἴώνων μὲν Χίος καὶ Τέως καὶ Φώκαια καὶ Κλαζομεναί· Δωριέων δὲ Ῥόδος καὶ Κνίδος καὶ Ἀλικαρνησσὸς καὶ Φάσηλις· Αἰολέων δὲ ἡ Μυτιληναίων μούνη· τούτων μὲν ἐστὶ τοῦτο τὸ τέμενος, καὶ προστάτας τοῦ ἐμπορίου αὐτὰι αἱ πόλιές εἰσι αἱ παρέχουσαι· ὅσαι δὲ ἄλλαι πόλιες μεταποιεῖνται, οὐδὲν σφί μετεὼν μεταποιεῖνται· χωρὶς δὲ, Αἴγυπῆται ἐπὶ ἑωυτῶν ἰδρύσαντο τέμενος Διός, καὶ ἄλλο Σάμιοι Ἡρῆς καὶ Μιλήσιοι Ἀπόλλωνος. Cf. THUK. IV, 97.

² DEM. XXXV, c. 45 οὐχ ἅπασιν ἡμῖν οἱ αὐτοὶ νόμοι γεγραμμένοι εἰσὶ καὶ τὸ αὐτὸ δίκαιον περὶ τῶν ἐμπορικῶν δικῶν;

was substantially identical in this connexion. A native of Siphnos in Keos, dying without issue, had adopted as his heir a fellow-countryman whom he had known all his life. Both men were residents at Aigina, and the trial took place in the court there. The will was disputed by a party belonging to a third city (unnamed). It was assumed that the law as to wills was identical in all three places.¹

In the Hellenistic period initiated by the conquests of Alexander the common institutions and doctrines of Greek law form a kind of "κοινή" in keeping with the common Greek language of the period.² The documents which give us an insight into this process are the inscriptions of Asia Minor and the Egyptian papyri. It is out of the question for us to go into details in this respect, but I should like to cite as an example the decree of Antigonos which directs the inhabitants of Teos to remodel their law on the pattern of a neighbouring State.³ Such a procedure could only be adopted in the case of institutions very similar in their essence. Another example may be taken from Egypt: the recently discovered collection of juridical notes prepared for an Alexandrian lawyer of the second century B.C. contains among other things a textual quotation from the municipal law of Alexandria as to the rights and duties of neighbouring owners of land. The law in question is borrowed literally from one of the *ἄξιοι* of Solon.⁴

The directing fact in the formation of all the more important varieties of Greek law was the existence of the small, closely-united City-State, and this fundamental condition produced similar results in Ionic as well as in Doric and Aiolic surroundings, in the Peloponnesos and in Attika

Common
principles.

¹ ISOKRATES (XIX), §§ 12-15. § 13 κατὰ τουτοῖ τὸν νόμον, . . . νόον μ' ἐποίησατο Θρασύλοχος, πολίτην μὲν αὐτοῦ καὶ φίλον ὄντα, γεγονότα δ' οὐδενὸς χεῖρον Σιφνίων, πεπαιδευμένον δ' ὁμοίως αὐτῷ καὶ τεθραμμένον. ὥστ' οὐκ οἶδ' ὅπως ἂν μᾶλλον κατὰ τὸν νόμον ἐπραξεν, ὅς . . . κελεύει παῖδας εἰσποιεῖσθαι. λαβὲ δὴ μοι καὶ τὸν Κεῖων νόμον, καθ' ὃν ἡμεῖς ἐπολιτενόμεθα. εἰ μὲν τοίνυν . . . τούτοις μὲν τοῖς νόμοις ἠγαντιοῦντο, τὸν δὲ παρ' αὐτοῖς κείμενον σύνδικον εἶχον, ἦττον ἄξιον ἦν θαυμάζειν αὐτῶν· νῦν δὲ κάκεῖνος ὁμοίως τοῖς ἀνεγνωσμένοις κείται.

² DIO CHRYSOSTOM, quoted by MITTEIS, *Römisches Privatrecht*, I, 61.

³ DITT. *Syll.*³ I. 344.

⁴ *Dikaiomata*, ed. by the Univ. of Halle (*Graeca Halensis*), pp. 64 ff.

as well as in Sicily or Asia Minor. In spite of the differences of political organization, the fact made itself felt that these City-States were welded out of federations of agnatic clans and that agnatic relationship continued to exert its influence even when the autonomy of the clans had given way before the requirements of the city-union. Besides, apart from certain wilfully backward cities like Sparta, the Greek world was a world of adventure, migration, commercial intercourse; the psychology of the race was marked by definite and ever-recurring traits—by a highly sensitive, artistic spirit, by eager exploration both on the theoretical and on the practical side, by a sense of harmony and measure. Starting from common family arrangements, the various cities carried out the process of law-making on analogous lines. When Hermione in Euripides' play wishes to sting her rival Andromache to the quick, she opposes the purity of Greek monogamy to the disgusting habits of barbarians accustomed to unions between the nearest relations.¹ "Such is the whole of the barbarian race; father cohabits with daughter, son with mother, sister with brother; the nearest and dearest die at one another's hands, and law in no wise keeps them from these crimes. Bring not these practices among us; for it is not right that one man should control two women; but having due regard for one marriage tie they are content,—unless one consents to an evil life." The connexion between family law and family religion, the efforts to keep up the material households centred around ancestral cults, the peculiar value of adoption, the treatment of the heiress as a link in the transmission of family property to the next of kin,² the conception of the *κληρος* as the normal allotment of a citizen family, the restrictions imposed on testamentary power

¹ EURIPIDES, *Andromache*, 173 ff. :

τοιούτων πάν τὸ βάρβαρον γένος·
πατήρ τε θυγατρὶ παῖς τε μητρὶ μίγνεται
κόρη τ' ἀδελφῶ, διὰ φόβου δ' οἱ φίλτατοι
χωροῦσι, καὶ τῶνδ' οὐδὲν ἐξείργει νόμος·
ἀ μὴ παρ' ἡμᾶς εἰσφερ'· οὐδὲ γὰρ καλὸν
δυοῖν γυναικοῖν ἄνδρ' ἔν' ἡγίας ἔχειν,
ἀλλ' εἰς μίαν βλέποντες εὐναίαν Κύπριν
στέργουσιν, ὅστις μὴ κακῶς οἰκεῖν θέλει.

² HERODOTOS, VI, 57.

in favour of legitimate children—all these features recur over and over again and evidently go back to an archaic association of kinsmen common to all Greeks.¹ On the other hand, the humanizing strain of Greek psychology and the early influence of commercial intercourse make themselves felt in such constant traits as the weakness of *patria potestas*, a feature noticed by Dionysios of Halikarnassos in contrast with Roman legal notions. The early development of the property rights of married women, the facilities for divorce, the emancipation of sons, the early disappearance of formalism in contracts, may also be referred to the humane tendencies of Greek life. On all these points the rules of the Kretan city of Gortyn are quite as characteristic as those of Athens, in spite of the fact that the Doric cities of Krete framed their law without being influenced in any way from Athens.²

Once the fundamental unity of Greek law has been recognized, we are, I think, at liberty to notice the more important variations within this comprehensive whole. Differences of race must have affected legislation as they have affected dialects, but it would be impossible in the present state of our knowledge to attempt any general inferences as to Doric or Ionic rules beyond such contrasts in racial character as have been noticed by the Greeks themselves—the rougher, coarser ways of the Dorians, the bent of Ionians towards exuberance and a freedom bordering sometimes on licence. What modern writers have tried to do in tracing such general characteristics in detail has not been very convincing. One must not forget that Argos and Syrakuse were quite as Doric as Sparta, and yet in government and legal arrangements these cities had certainly more in common with Miletos or Athens than with Lakedaimon. The most conspicuous monument of Doric law, the code of Gortyn, shows features of very progressive legal thought (e.g. the treatment of daughters as to succession, the law of divorce, &c.). Customs as to

Racial
charac-
teristics.

¹ MITTEIS, *Röm. Privatr.*, I, pp. 11 f. Cf. e.g. the dispositions of the law of Gortyn as to the *πατρῴϊκος* (I. J. G., I, xvii §§ 43-48, p. 375), with the Athenian law as to the *ἐπίκληρος* (DAE. et S. s.v. *ἐπίκληρος*).

² See e.g. *Law of Gortyn*, §§ 9, 14, 20, 31 (I. J. G. pp. 359 ff.).

common meals, and the military clubs which gave a peculiar stamp to Kretan cities as well as to Sparta, were the result of a life in camp which was not essentially Doric, but was rather brought about by preparation for war on land, as was clearly perceived and well expressed by Plato.¹ Neither Korinth, nor Syrakuse, nor Argos had anything of the sort.

Constitutional contrasts.

On the other hand, a promising line of inquiry leads to a comparison between variations of juridical treatment conditioned by differences of constitutional systems. Democracies did not shape their law in the same way as oligarchies, and monarchies or tyrannies were also bound to influence legal arrangements in a peculiar manner. To mention one characteristic fact of this kind, in Isokrates' speech ascribed to Nikokles, King of Salamis in Cyprus, it is laid down as a consequence of the monarchical principle that citizens are not allowed to form associations without the leave of the government: this doctrine runs counter to the ordinary law of Greek republics, and is evidently a consequence of the fact that citizens of Salamis were subjects of a personal ruler, and that monarchs are jealous of combinations which might gather political importance and become a menace to their power.² Aristotle has some interesting remarks as to legislation desirable and actually obtaining in oligarchies and democracies. In discussing Spartan institutions he notices the tendency to equalize the members of the ruling minority in respect of property. The Lakedaimonian ruling class was composed of *ὄμοιοι*, meant to be equals in social standing as well as in political rights. One of the means of securing such equality was to prohibit the alienation of land. But Aristotle is careful to add that the Spartan legislators were not consistent in this respect. They forbade sales, but allowed donations and bequests. The result was a rapid growth of inequality of

¹ *Laws* I, 633 a τὰ ξυσσιτία φάμεν καὶ τὰ γυμνάσια πρὸς τὸν πόλεμον ἐξευρῆσθαι τῷ νομοθέτῃ; *Nul.*

² ISOKRATES III, 54, p. 38 a b :

"Do not form clubs and associations without my sanction; for combinations of this kind may be profitable in other kinds of States, but in monarchies they are dangerous. Keep yourselves not only from crimes, but from practices of this kind, as to which it is inevitable that suspicion should arise."

fortunes, and more especially the concentration of wealth in land through marriages.¹

Those observations of the defects and inconsistencies of the Spartan legal system lead on to a scheme of legislation on property recommended to oligarchies, if they want to maintain the rule of a minority.²

Plato's well-known legislative plan in the *Laws* is dictated by similar considerations. In this case an *aristocracy*, a government of specially educated citizens, is aimed at. The corner-stone of the system is the formation of 5,040 indivisible and inalienable shares or holdings.³ The prescriptions of Aristotle and Plato were not followed to the letter in any one State, but in Sparta and elsewhere drastic measures were occasionally taken to preserve or to renew compulsory equality between holdings: witness the reforms in the reigns of Agis III and Kleomenes III, when attempts were made to re-enact the legendary distribution of holdings by Lykurgos.

Democracy had a natural bent towards loosening the strictness of social ties, and it inclined therefore to great indulgence in the treatment of women, children, and slaves.⁴ In commenting on Kleisthenes' reform Aristotle explains how important it was for the establishment of democracy to break the influence of ancient clans, and to introduce a reform of social law by reducing the number of private cults, and transferring their privileges to public bodies.⁵ There are also many hints as to a policy by which the mass of the poor citizens, once they have acquired political sway, subject the rich to exactions of all kinds, and ruin them by burdening them with *λειτουργίαι*.⁶ This view is

¹ AR. *Pol.* II, p. 1270 a, 19:

"Although the legislator rightly holds up to shame the sale or purchase of an inheritance, he allows anybody who likes to give and bequeath it."

² *Ibid.* VII (V), 1309 a, 14 ff.

³ PLATO, *Laws*, V, 737 e and 740 b.

⁴ NEWMAN, *Politics of Aristotle*, Vol. IV, p. 460. (*Pol.* 1313 b and 1319 b.)

⁵ AR. *Pol.* VIII (VI), p. 1319 b 23 φυλαί τε γὰρ ἕτεροι ποιηταί πλείους καὶ φρατρίαι, καὶ τὰ τῶν ἰδίων ἱερῶν συνακτέον.

⁶ *Ibid.* VII (V), p. 1305 a 3 ὅτι μὲν γὰρ, ἵνα χαρίζωνται, ἀδικούντες τοὺς γνωρίμους συνιστᾶσιν, ἢ τὰς οὐσίας ἀναδάστους ποιούντες ἢ τὰς προσόδους ταῖς λειτουργίαις· ὅτι δὲ διαβάλλοντες, ἵν' ἔχῃσι δημεύειν τὰ κτήματα τῶν πλουσίων.

expressed in a blunt and cynical way in the oligarchic pamphlet on the Athenian constitution ascribed to Xenophon.¹

Limits of inquiry.

In describing the way in which legal systems arise in the course of European development, our aim ought to be to strike averages and to discover the balance of forces, not to trace the innumerable fluctuations of the growth and decay of actual laws. The latter task belongs to legal history, while historical jurisprudence has to deal with the relation between the legal rules and the institutions of an epoch in their doctrinal connexion. This means that we shall have to concentrate on certain periods and abstain from an attempt to account for all details. We are not concerned either with the tribal beginnings of Greek law, or with its exuberant growth in Hellenistic times, although now and then a principle established in the fifth and fourth centuries B. C. may be well illustrated from late inscriptions or papyri. But we must renounce all systematic exposition of the complex legal currents of Hellenistic civilization, and as for the institutions of ancient Greece, they have already been referred to on some occasions in the volume on Tribal Law.² It is the inscriptions, the speeches, the historical and philosophical writings of the sixth, fifth, and fourth centuries B. C. that form the main basis for our study.

Another limitation is imposed by the fragmentary state of our data. The materials bearing on Athenian legal institutions are much more copious than the evidence from

¹ [XEN.] *Resp. Ath.*, I, 3 and 4 ἔπειτα ὅποσαι μὲν σωτηρίαν φέρουσι τῶν ἀρχῶν, χρησταὶ οὐσαι καὶ μὴ χρησταὶ κίνδυνον τῷ δήμῳ ἄπαντι, τούτων μὲν τῶν ἀρχῶν οὐδὲν δείται ὁ δῆμος μετεῖναι (οὔτε τῶν στρατηγῶν κλήρω οἴονται σφίσι χρῆναι μετεῖναι οὔτε τῶν ἱππαρχῶν)· γινώσκει γὰρ ὁ δῆμος ὅτι πλείω ὠφελείται ἐν τῷ μὴ αὐτὸς ἄρχειν ταύτας τὰς ἀρχάς, ἀλλ' ἔαν τοὺς δυνατωτάτους ἄρχειν ὅποσαι δ' εἰσὶν ἀρχαὶ μισθοφορίας ἔνεκα καὶ ὠφελείας εἰς τὸν οἶκον, ταύτας ζητεῖ ὁ δῆμος ἄρχειν. ἔπειτα δὲ, ὃ ἔνιοι θαναμάζουσιν ὅτι πανταχοῦ πλέον νέμονται τοῖς πονηροῖς καὶ πένησι καὶ δημοτικοῖς ἢ τοῖς χρηστοῖς, ἐν αὐτῷ τούτῳ φανοῦνται τὴν δημοκρατίαν διασφάζοντες. οἱ μὲν γὰρ πένητες καὶ οἱ δημόται καὶ οἱ χείρους ἐπ' πράττοντες, καὶ πολλοὶ οἱ τοιοῦτοι γινόμενοι τὴν δημοκρατίαν αὔξουσιν· ἐὰν δὲ εὔπράττωσιν οἱ πλοῦσιοι καὶ οἱ χρηστοί, ἰσχυρὸν τὸ ἐναντίον σφίσι αὐτοῖς καθιστᾶσιν οἱ δημοτικοί.

It was by tracing the connexion between constitutions and ordinary laws that Montesquieu came to plan his famous *Esprit des Lois*. Ancient materials, sometimes misunderstood and sometimes analysed with considerable acumen, served to a great extent as the basis for his generalizations.

² *Historical Jurisprudence*, Vol. I, pp. 243, 303, 326, etc.

all other cities of the Greek world taken together. Therefore every attempt to state Greek juridical doctrines is bound to assume an Athenian colouring. If we had possessed an approximately equal number of ascertained facts in respect of the laws of Sparta, Argos, Thebes, Korinth, we might have been able perhaps to notice more or less fully the interesting variations brought in by the difference of race and the contrasts of political organization. As it happens, nothing complete can be achieved with the help of the materials at hand, and although peculiarities of the law of Gortyn, or of the laws of Ionian cities, will be noticed whenever possible, it is the common law of Greece, the *κοινή* of the classical period, that will have to be reconstituted as far as possible by the help chiefly of Athenian materials.

The Greeks did not allow their law to lapse into abstruse technicality and to become a tool of professional jurists. Greek law in its application was meant to be a frame for public opinion. In Athens, at any rate, the remarkable experiment was made of handing over the administration of justice and the application of legal rules to batches of 201, 401, 1,001 jurors. The principle on which heliasts were called to decide cases was the same as that which has made the institution of the jury the usual device for deciding questions of fact in modern criminal procedure. It is the view that justice should be administered to the members of a community in accordance with the standards of morality and common sense prevailing in this community. But the Greeks went much further than we do, and entrusted to their many-headed juries not only questions of fact and responsibility, but questions of law which affected the distribution and enforcement of rights. It is most instructive to watch the results of this experiment on a large scale. Opinions differed among the experimenters themselves. We need not lay much stress on the contemptuous estimate of Plato, for he condemns all the democratic institutions of Athens, and yet Athenian democracy had formed the background for the greatest achievements of Greek genius. The extant speeches of pleaders indeed show that the experiment led to a somewhat

capricious application of the law, opened the door for sentimentalism, prejudice, and sophistry.¹ The heliasts were often circumvented, "bamboozled" by crafty pleaders, as Wyse, one of our authorities on the subject, has irreverently expressed it.² But, on the whole, I confess that the wonder seems to be not that the heliasts should have been sometimes led astray or that they proved unable to analyse doctrine in the same way as [this was done by Roman jurists, but rather that they should have grappled with their task as well as they did. These large tribunals were admittedly free from corruption, and, what is more, they were well able to appreciate the acute dialectics of Isaios or the refined literary skill of Hypereides. Apart from that, although learned jurisprudence in the sense of the Romans could not arise on such soil, the courts succeeded in treating problems of property, possession, obligation, association, etc., in the light of advanced notions of justice, fairness, and social expediency. This explains why Greek legal rules, instead of disappearing before the more strict and technical doctrines of Roman jurists, came to modify the latter in many ways: the more we study Roman Law, the larger is the share we have to assign to the influence of Greek custom and Greek legislation.

2. *The Social Type.*

The *polis*.

In considering the Greek *polis* and its institutions four features appear to be of special importance from the outset.

1. The Greeks recognized a close analogy between the organization of the State and the organism of the individual human being. They thought that the two elements of body and mind, the former guided and governed by the latter, had a parallel in two constitutive elements of the State, the rulers and the ruled. As Aristotle puts it in the *Politics*:

¹ Cf. ISOKRATES, XVIII, 9, 10 . . . ὡς πολλὰ παρὰ γνώμην ἐν τοῖς δικαστηρίοις ἀποβαίνει, καὶ ὅτι τύχη μᾶλλον ἢ τῷ δίκαιῳ κρίνεται τὰ παρ' ἡμῖν. And LYKURGOS, in *Leokr.* §§ 11, 12 οἱ . . . πλείστοι τῶν εἰς ἡμᾶς εἰσιόντων πάντων ἀποπάτατον ποιοῦσιν· ἡ γὰρ συμβουλευέουσιν ἐνταῦθα περὶ τῶν κοινῶν πραγμάτων, ἢ κατηγοροῦσι καὶ διαβάλλουσι πάντα μᾶλλον ἢ περὶ οὐ μέλλετε τὴν ψῆφον φέρειν. . . . τούτων δὲ αἴτιοι ἡμεῖς ἐστέ, ὧ ἄνδρες· τὴν γὰρ ἐξουσίαν ταύτην δεδώκατε τοῖς ἐνθάδ' εἰσιούσιν.

² WYSE, *Speeches of Isaeus*, p. 483.

"he who can foresee with his mind is by nature intended to be lord and master, and he who can work with his body is a subject, and by nature a servant."¹

2. The second point to notice is the restriction in size of the Greek State; in contrast with the modern State the πόλις may be described as a political club, endowed with powers of government and legislation, and requiring a close connexion in thought and action between all its members. Aristotle in the *Ethics* compares the number constituting a circle of friendship with that of a city, saying that there must be a definite limit: "for a city could not consist either of ten persons or of a hundred thousand."² And again in the *Politics*: "the most natural limit of the population of a State is said to be the largest number which suffices for the purposes of life, and can be easily surveyed."³

3. The political association practised in the Greek States may be regarded as the very opposite of the restricted State organization recommended by modern individualists. In order to discover anything analogous to the *laissez-faire* doctrine one would have to go down in Greek political development to the views of Epicurus, suggested by the decay of the Hellenic polity.⁴ In the classical period the State was not conceived as a kind of necessary evil to be tolerated for the sake of order and security. On the contrary, the Greeks attributed a positive aim to the State; it exists not merely to facilitate association, but to shape it: to help reasonable and strong-minded men in the pursuit of *welfare*. This is the proper sphere of the State, because the task of finding true welfare is out of the range

The
pursuit of
welfare.

¹ *Pol.* I, 1252 a 31 τὸ . . . δυνάμενον τῇ διανοίᾳ προορᾶν ἄρχον φύσει καὶ δεσπόζον φύσει, τὸ δὲ δυνάμενον τῷ σώματι ταῦτα ποιεῖν ἀρχόμενον καὶ φύσει δούλον. Cf. *ibid.* I, 1254 a; III, 1287 a; IV (VII), 1332 b.

² *Eth. Nik.* IX, 1170 b ἔστι τι μέτρον καὶ φίλικού πλήθους, ὡς περ πόλεως· οὔτε γὰρ ἐκ δέκα ἀνθρώπων γένοιτ' ἂν πόλις, οὔτ' ἐκ δέκα μυριάδων ἔτι πόλις ἔστιν.

³ *Pol.* IV (VII), 1326 b 23 οὗτός ἐστι πόλεως ὄρος ἄριστος, ἡ μεγίστη τοῦ πλήθους ὑπερβολὴ πρὸς αὐτάρκειαν ζωῆς εὐδύνοπος. We know from the statement of Philochoros (*Schol. in Aristoph. Vesp.* v. 718) that in 445 B. C. the number of citizens of Athens was reduced from 21,000 to about 15,000. Cf. FRAENKEL, *Die attische Geschworenengerichte*, pp. 13 ff.

⁴ MAX WUNDT, *Geschichte der griechischen Ethik*, II, pp. 195 f. Cf. ZELLER, *Outlines of the History of Greek Philosophy* (Eng. trans. 1901), pp. 266 f.

of individual effort, but within the range and power of a political association. The State exists *οὐ μόνον τοῦ ζῆν ἕνεκα, ἀλλὰ τοῦ εὖ ζῆν*.

But what is meant by "welfare"? How did the Greeks conceive a "good life" (*εὖ ζῆν*)? Without going into the details of philosophical doctrines on this subject, let us consider some of the common interpretations which were given of the notion of welfare. In the following passage of his *Rhetoric*¹ Aristotle collects some of the current definitions of *εὐδαιμονία*: *ἔστω δὴ εὐδαιμονία εὐπραξία μετ' ἀρετῆς, ἢ αὐτάρκεια ζωῆς, ἢ ὁ βίος ὁ μετ' ἀσφαλείας ἡδιστος, ἢ εὐθηνία κτημάτων καὶ σωμάτων μετὰ δυνάμεως φυλακτικῆς τε καὶ πρακτικῆς τούτων· σχεδὸν γὰρ τούτων ἐν ἡ πλείω τὴν εὐδαιμονίαν ὁμολογοῦσιν εἶναι ἅπαντες*. In point of interest these definitions may be examined in inverted order. The thought expressed in the words *βίος μετ' ἀσφαλείας ἡδιστος* presents a kind of naïve Epicurean view which does not require very close examination. Nor again does the last. More important are the other two. The second definition summarizes in two words a principle which is insisted on from the very beginning of Aristotle's *Politics* to the end, namely that the aim of society is to enable men to be self-sufficient. Again, welfare is said to consist in "well-doing combined with virtue." Virtue in the abstract is not sufficient: it must be accompanied by *εὐπραξία*, virtue in action. This is characteristic of popular ideals in Greece. The conception of active virtue is fundamental in the idealistic philosophy of the fourth century. Aristotle refers to it several times; in the *Politics* he puts it for example in the following way: "happiness is . . . a realization and perfect practice of virtue", *εὐδαιμονία . . . ἀρετῆς ἐνέργεια καὶ χρῆσις τις τέλειος*.²

¹ *AR. Rhet.*, I, 5. 3, p. 1360 b. "Take Happiness to be either well-doing, through the exercise of virtue or self-sufficiency of life; or that existence which combines safety with pleasure; or a flourishing state of wealth and health, with the power of guarding and producing it; for it may be said that all men allow Happiness to be one or more of these things." Cf. *Pol.* IV (VII), p. 1325 b 14 *ἀλλ' εἰ . . . τὴν εὐδαιμονίαν εὐπραγίαν θετέον, καὶ κοινῇ πάσης πόλεως ἂν εἴη καὶ καθ' ἕκαστον ἄριστος βίος ὁ πρακτικός*.

² *Pol.* IV (VII), 1328 a 38; cf. 1332 a 9; cf. PLATO, *Republic*, VII, p. 540. A kindred notion is expressed by Thukydidēs in the famous sentence: *φιλοκαλοῦμέν τε γὰρ μετ' εὐτελείας καὶ φιλοσοφοῦμεν ἄνευ μαλακίας*.

As it was on these lines that the State aimed at providing for the attainment of welfare, the initial problem clearly was to decide what kinds of things it could actually guarantee. Of course the State could not promise that it would achieve an absolutely favourable result: however careful the organization may be, human life is surrounded with possibilities favourable or unfavourable, as the case may be, which may upset all calculations by the impact of blind forces of nature. What can be attempted is similar to the activity of mariners, who, though unable to eliminate rocks and bad weather, try to use the winds and to overcome dangers by courage and skilful management. Aristotle holds fast to the conclusion that in spite of the element of chance in human affairs, it is possible to direct political life in such a way that wise and virtuous men may reasonably expect the maximum of human happiness.¹ "He who would duly inquire about the best form of a State ought first to determine which is the most eligible life; while this remains uncertain the best form of the State must also be uncertain; for in the natural order of things, those may be expected to lead the best life who are governed in the best manner of which their circumstances admit." To this end the individual must endeavour to combine the four cardinal virtues—courage, justice, moderation, and wisdom.

4. The practical question remains: What means are to be employed to construct the ship in such a way that it may provide the desired help for withstanding peril? The utmost care must be taken in regard to the component parts. The individual is a component part of the whole, and therefore the direct action of the State upon the individual in Greece was much greater than that contemplated in any modern society.

In the case of the military socialism of Sparta this is obvious; in Athens there was of course a good deal of room for individual development, as is insisted upon, for

¹ AR. Pol. IV (VII), p. 1323 a 14 *ἀνάγκη δὴ τὸν μέλλοντα περὶ αὐτῆς ποιήσασθαι τὴν προσήκουσαν σκέψιν διορίσασθαι πρῶτον τίς αἰρετώτατος βίος. ἀδύλου γὰρ ὄντος τούτου καὶ τὴν ἀρίστην ἀναγκαῖον ἀδύλου εἶναι πολιτείαν· ἄριστα γὰρ πρᾶττειν προσήκει τοὺς ἄριστα πολιτευομένους ἐκ τῶν ὑπαρχόντων αὐτοῖς, ἐάν μὴ τι γίγνηται παράλογον.*

Educa-
tional
rule.

instance, in Thukydides' account of the Funeral Oration of Perikles. In fact, according to Aristotle, democracy tended generally towards the emancipation of the individual: "the basis of a democratic state is liberty", he says, and liberty with the sense of doing what one likes (*ὅπως ἂν βούληται τις*)¹; but he feels that this tendency is a dangerous one, "for where absolute freedom is allowed there is nothing to restrain the evil which is inherent in every man."² As a matter of fact Aristotle mentions a number of measures contemplated or adopted in democratic communities for the purpose of regulating property and its uses.

In any case, from the point of view of present-day individualists, Greek citizens were subject to frequent interference by the City. The State was an educational institution, and it was its duty to take the citizens at as early an age as possible and to keep them under the beneficial influence of laws throughout life. Thus in the *Ethics* Aristotle says: "the factors which tend to produce virtue in general are those regulations which are prescribed with reference to the education of man as a citizen."³ A socialistic point of view is expressed with exaggeration by Plato in the *Laws*: "O my friends, we will say to them, hard is it for you, who are creatures of a day, to know what is yours,—hard, too, to know yourselves, as the Delphic oracle says, at this hour. Now I, as the legislator, regard you and your possessions, not as belonging to yourselves, but as belonging to your whole family, both past and future, and yet more do I regard both family and possessions as belonging to the State."⁴ Being creatures of a moment, we cannot profess to understand what we

¹ *Pol.* VIII (VI) 1317 a 40. Cf. ZIMMERN, *The Greek Commonwealth*, pp. 195 ff.

² *Ib.* 1318 b 39 ἡ γὰρ ἐξουσία τοῦ πράττειν ὁ τι ἂν ἐθέλη τις οὐ δύναται φυλάττειν τὸ ἐν ἐκίστῳ τῶν ἀνθρώπων φαῦλον.

³ *Eth. Nik.* V, 2, 11, 1130 b 25 τὰ ποιητικὰ τῆς ὄλης ἀρετῆς ἐστὶ τῶν νομίμων ὅσα νομοθετῆται περὶ παιδείαν τὴν πρὸς τὸ κοινόν. Cf. PÖHLMANN, *Geschichte der sozialen Frage und der Sozialismus in der antiken Welt*, I, pp. 152 ff.

⁴ *Laws*, XI, 923 a ὦ φίλοι, φήσομεν, καὶ ἀτεχνῶς ἐφήμεροι, χαλεπὸν ὑμῖν ἐστὶν γινώσκειν τὰ ὑμέτερ' αὐτῶν χρήματα καὶ πρὸς γε ὑμᾶς αὐτοὺς, ὥσπερ καὶ τὸ τῆς Πυθίας γράμμα φράζει, τὰ νῦν. ἔγωγ' οὖν νομοθέτης ὢν οὐθ' ὑμᾶς ὑμῶν αὐτῶν εἶναι τίθημι οὔτε τὴν οὐσίαν ταύτην, σύμπαντος δὲ τοῦ γένους ὑμῶν τοῦ τε ἔμπροσθεν καὶ τοῦ ἔπειτα ἐσομένου, καὶ ἔτι μᾶλλον τῆς πόλεως εἶναι τὸ τε γένος πᾶν καὶ τὴν οὐσίαν.

are, nor what belongs to us, nor what our real function is for ourselves and for the State.

Such were the aims of the Greek State—enunciated sometimes in a moderate and sometimes in an exaggerated manner. In spite of the well-known contrasts in life and character between Sparta and Athens, the philosophers assumed a fundamental similarity between them as regards the educational task of the State. As Aristotle put it, although the conceptions of Sparta may be narrow, the way in which they are brought to bear upon the individual should serve as a model for all States. The ideal of social existence is attained when every man lives as an equal of his fellow-citizens, an *ὄμοιος*, and is thoroughly imbued with devotion to the corporate life of the city.¹ Commonplace notions in this respect were formulated, e.g. by Isokrates, an orator not conspicuous for originality and power, but a characteristic representative of public opinion in his time. In his *Areiopageitikos* he declares that those who have means should be taught horsemanship, athletics, and philosophy in order to be able to live the higher life.²

¹ Cf. WILAMOWITZ-MOELLENDORFF, in HINNEBERG, *Kultur der Gegenwart*, II, 4, 1, pp. 114 f.

² ISOKRATES, VII, 45 τοὺς δὲ βίον ἰκανὸν κεκτημένους περὶ τε τὴν ἵππικὴν καὶ τὰ γυμνάσια καὶ τὰ κνηγέσια καὶ τὴν φιλοσοφίαν ἠνάγκασαν διατρίβειν, ὀρώντες ἐκ τούτων τοὺς μὲν διαφέροντας γιγνομένους, τοὺς δὲ τῶν πλείστων κακῶν ἀπεχομένους.

CHAPTER II

THE CONCEPT OF LAW

1. *Popular notions.*

Defini-
tions of
law.

THE precepts concerning a welfare achieved by means of civic virtue are, of course, all counsels of perfection. In their bearing on juridical issues they culminate in the notion of *justice*. The abstract qualities of courage and wisdom cannot be directly governed by law, but justice (*δικαιοσύνη*) is a conception which is of the utmost importance in the whole Greek theory of law, and leads to the particular domain of *νόμος* which it is our purpose to investigate.

In order to determine the nature of *νόμος* let us again notice some popular definitions which will serve as a guide. In the *Digest* (I. 3. 2) we find a passage which has been taken over by the Romans in the original Greek—it comes from the first speech of Demosthenes against Aristogeiton.¹

Aristogeiton is treated by Demosthenes as a typical law-breaker, and the speaker lays stress on the idea that it is only in accordance with the established laws that healthy social life is possible. The concrete points mentioned are: that law is sacred in its origin, being a gift of the gods; that it is instituted by wise men; that its function is to redress and correct mistakes and failures, whether they be the result of deliberate intention or of negligence; and finally that it is a compact (*συνθήκη*) entered into by the members of the city. These attributes are clearly set forth, and indicate the direction which the Greek mind took in considering the social functions of law.

¹ DEM. XXV, § 16, p. 774. The original text has been remodelled slightly by Tribonian's commission. οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τοῦτο ζητοῦσι, καὶ ἐπειδὴν εὔρεθῆ, κοινὸν τοῦτο πρόσταγμα ἀπεδείχθη, πᾶσιν ἴσον καὶ ὅμοιον, καὶ τοῦτ' ἔστι νόμος. ὧ πάντας πείθεσθαι προσήκει διὰ πολλά, καὶ μάλιστα ὅτι πᾶς ἔστι νόμος εὖρημα μὲν καὶ δῶρον θεῶν, δόγμα δ' ἀνθρώπων φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ ἀκουσίων ἀμαρτημάτων, πόλεως δὲ συνθήκη κοινῆ, καθ' ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει. (Text of Butcher's ed., S.C.B.O.)

These general expressions received particular meaning in the popular mind, and indicated certain characteristics which were far from being commonplace. They are expressed in one or two typical definitions. Aristotle, in the *Rhetoric*, thus defines *δικαιοσύνη*: *ἔστι δὲ δικαιοσύνη μὲν ἀρετὴ δι' ἣν τὰ αὐτῶν ἕκαστοι ἔχουσι, καὶ ὡς ὁ νόμος, ἀδικία δὲ δι' ἣν τὰ ἀλλότρια, οὐχ ὡς ὁ νόμος.*¹ The characteristic point here is that positive legality is introduced as a substantive element of justice. It is not sufficient to accept the principle of justice in the abstract, because it is vague and ambiguous; the question arises: "What is my own, and what is somebody else's?" and although from the pleader's point of view this is a matter of subjective appreciation, the city is called upon to give definite and objective directions in its laws.

There is nothing in the Greek language exactly corresponding to the Latin *jus*. The Roman term cannot be translated by *νόμος*, which is mainly used for statutory law—*lex*. Nor is *τὸ δίκαιον* an equivalent, for it signifies "the just," and is so employed, for instance, by Cicero, who does not even attempt to translate the term. These phraseological peculiarities point to the highly important fact that the Greeks regarded law primarily as the embodiment of justice—it is *τὸ δίκαιον* as interpreted by the city. Again, take such a word as *τὸ νόμιμον*: in its etymological origin it is connected with *νομίζειν*, and connotes the currently accepted notions of morality and justice (*ἃ νομίζονται*).²

All these indications point towards a traditional view of law in general as a complex of ethical rules. To the Varieties of custom.
Greek philosophers of the older schools law was a sacred and fundamental institution. Herakleitos declared that citizens ought to defend their laws as they defend the walls of their city,—*μάχεσθαι χρὴ τὸν δῆμον ὑπὲρ τοῦ νόμου ὀκωσπερ τείχεος*³; and again, he tells us that the law is

¹ *Rhet.* I, 9, 1366 b 9. "Now justice is a virtue, through which every set of men have their own under the law; injustice is a vice, through which men have—not under the law—what is *not* their own." (Cf. Jebb, p. 37.)

² See article by WILAMOWITZ-MOELLENDORFF in *Zum ältesten Strafrecht der Kulturvölker*, p. 22, ed. K. BINDING, Leipzig, 1905.

³ DIELS, *Fragmente der Vorsokratiker*, I, 3, p. 86, fr. 44. BYWATER, Fr. 100.

a divine creation—*τρέφονται γὰρ πάντες οἱ ἀνθρώπειοι νόμοι ὑπὸ ἐνὸς τοῦ θεοῦ*.¹ It is evident, however, that there is a certain contradiction between these two assertions. Is it possible to claim a divine origin for law and at the same time to localize it within the walls of a particular city? The force of this objection was brought home to the Greeks by their experiences in the discovery of varied customs and legal rules. It is out of the question to think of Greek cities as if they were isolated: they were self-sufficient to some extent, but not isolated. A German economist, von Tünnen, has written about what he calls the "isolated State," and has drawn many deductions from a consideration of the State as an isolated economic unit of social organization. It is impossible to regard the Greek States in this way; they were inextricably bound up with each other, and the traveller had only to cross some arm of the sea to find himself among barbarians whose institutions were very different from those of his own home.

This is one of the starting-points in the consideration of Greek social institutions. We cannot understand the Sophists or Plato without taking into account that they lived at the close of an age of discovery. Travellers from Greece were penetrating into Persia, Italy, Gaul, Africa. The book which best represents this spirit of discovery and curiosity is the work of Herodotos. His history is in a sense a general survey of the *Mirabilia Mundi*. It is interesting to note how the comparative view of law asserts itself in his narrative. He realizes that the customs of different countries exhibit remarkable differences, and that it is impossible to apply the same standards to all. Take a curious tale in the third book of his history.² Certain Greeks were being entertained by King Dareios at a banquet, and Dareios asked them for what price they would eat the bodies of their dead parents. They repudiated the suggestion with horror. The king then called up men from an Indian tribe who happened to be at the court at

¹ *Ibid.* p. 100, Fr. 114. BYWATER, Fr. 91 b. Cf. ISOKRATES XV, 82 τῶν μὲν νόμων ἐπαινεῖσθαι τοὺς ἀρχαιοτάτους, τῶν δὲ λόγων τοὺς καινοτάτους.

² HERODOTOS, III, 38. Cf. GOMPERZ, *Greek Thinkers*, trans. L. Magnus, I, p. 403.

the same time, and among whom such a custom actually prevailed. These Indians were asked to say what price they would take for burning their dead, and they repudiated such an idea with as much indignation as the Greeks had shown in regard to eating human flesh. Herodotos evidently notes this as an example of how widely peoples differ in their fundamental notions of morals and right. In a dialogue ascribed to Plato, and probably written by some anonymous contemporary of his, there occurs a passage of some interest in this connexion:¹ "Whereas for ourselves human sacrifices are not customary, but are unrighteous, the Carthaginians do make such sacrifices as being righteous and customary for them; some even sacrificing their own sons to Kronos . . . Moreover, you have probably been told of the customs which we ourselves practised in former days in connexion with the dead, slaying victims before the funeral procession started and sending for women to gather up the bones. And still earlier generations used even to bury the dead in their houses. But we ourselves do none of these things." Thus the intercourse between cities and some knowledge of comparative institutions enabled the Greeks to take up the comparative point of view in jurisprudence and political science. These national divergences were in themselves enough to show that law could not be regarded as something universal and immutable. How then was it possible to ascribe a divine origin to it? This could evidently apply only to the process of lawmaking in general, and not to the particular results in each single case. Perhaps it were better to say, as Herakleitos had said, that the laws should be defended as resolutely as the walls of the city.

There was yet another reason for social unrest. The close of the fifth century was a time of terrible catastrophes; all the fundamental notions of men were shaken and disturbed: throughout Greece parties were in conflict and

¹ PLATO, *Minos*, 315 b c ἐπεὶ αὐτίκα ἡμῖν μὲν οὐ νόμος ἐστὶν ἀνθρώπων θύειν ἀλλ' ἀνόσιον, Καρχήδονοι δὲ θύουσιν ὡς ὄσιον ἢ καὶ νόμιμον αὐτοῖς, καὶ ταῦτα ἔνοι αὐτῶν καὶ τοὺς αὐτῶν υἱεῖς τῷ Κρόνῳ . . . ὥσπερ καὶ ἡμᾶς αὐτοὺς οἴσθι πον καὶ αὐτὸς ἀκούων οἷσι νόμοις ἐχρώμεθα πρὸ τοῦ περὶ τοὺς ἀποθανόντας, ἱερεῖά τε προσφύττοντες πρὸ τῆς ἐκφορᾶς τοῦ νεκροῦ καὶ ἐγχευιστρίας μεταπεμπόμενοι· οἱ δ' αὖ ἐκείνων ἔτι πρότερον αὐτοῦ καὶ ἔθαπτον ἐν τῇ οἰκίᾳ τοὺς ἀποθανόντας· ἡμεῖς δὲ τούτων οὐδὲν ποιούμεν.

strife prevailed everywhere. The situation was summed up by Thukydides in his third book (c. 82) when he said: "Men believe nothing but that nothing is secure."

Legal con-
ceptions
in the
plays of
Aischylos.

With regard to law—as indeed in all other subjects of public importance—the evolution of the Greek drama throws a strong light on the movements of public opinion. The intense strain of dramatic literature at this period may be traced to a great extent to the influence of the tremendous social and political conflicts which were taking place in actual life. If we consider the historical features of this time, we cannot help being forcibly struck by its dramatic framework and by the irreconcilable contrast between its elements. Take, for example, the *Supplives*. There has been considerable controversy in connexion with this play. The plot is well known. The Danaids fly from the sons of Aigyptos because they revolt with horror from the idea of a marriage with their first cousins. Now the marriage of first cousins was an every-day occurrence in Athens, and it is asked as a problem of criticism, how could an Athenian audience listen with patience to a drama which is founded upon the idea that a union between cousins is a form of loathsome incest? The explanation seems to be that the extant play emphasizes one of the points of view in the dramatic conflict; that it is part of a trilogy, and, no doubt, if we had the complete trilogy, we should see the point of view of the bridegrooms as strongly represented as that of the brides. This means that Aischylos and the Athenians who followed the play with interest were fully able to appreciate the tragic greatness of conflicting opinions, even when they did not coincide with their own. Take again the *Oresteia*: once more Aischylos puts before us the conflict of views and moral duties. The central problem of the play cannot be solved without a disturbance of moral equilibrium; and it is significant that the poet is not only concerned with the tumult in the soul of Orestes, but with the fact, emphasized by the Erinyes, that the most sacred commandment—the filial duty of a son towards his mother—had been broken. The liberating crisis comes through the intervention of Apollo and Athena, who represent a new current in thought and law. As they

recognize the claim of the father to filial piety as being as great as that of the mother, they open the way to atonement for the unfortunate man who had to avenge his father on his own mother. One can hardly doubt that the legend which forms the subject of the play had been suggested by a conflict between matriarchal and patriarchal ideas. This does not mean that just before the time of Aischylos Athens had been living under matriarchal rule; but there were many traces of matriarchal customs in early Greece, and in writing this fifth-century drama the poet was able to assume that the audience would follow the thread of folk-lore with understanding and interest. In process of time dramatic authors concern themselves more and more with the problems of individual conscience and political struggle. Sophokles, for instance, dealt primarily with the problem of *fate* in relation to the life of individuals.

The most copious and interesting materials illustrating the fermentation of popular ideas as to law are presented by Euripides. He subjects individual rights and ideas to the most searching and unsparing criticism. Two plays are especially striking in this connexion, the *Medeia* and the *Phoinissai*. It can hardly be doubted that in the first of these plays the principal character is intended to enlist the sympathy of the audience as against the hypocritical assertion of a national superiority of Greeks in matters of law and justice.

Contrasts
in the
plays of
Euripides.

The story is well known: Jason wins the love of Medeia, a barbarian princess, who betrays and deserts her country and her parents for his sake. She follows him to Korinth, but there, in the hope of making a good match, he abandons her and woos a Korinthian maiden. The pathos of Medeia's position is beautifully rendered by Euripides; in defending himself against her claims Jason appears in a very unfavourable light; he tries to turn the tables against his accuser and to prove that he has in truth conferred benefits upon her. "But indeed you have received more than you have granted, something greater than my safety, as I will tell. In the first place you have come to dwell in Hellas instead of a barbarian country, and you are learning

to know justice and to live by laws whose sanction is not force."¹ There is a pungent irony in the fact that the betrayer, the faithless man, is made to boast of the national sense of justice—justice for its own sake, not as an outcome of force.

In the *Phoinissai* the scene is laid in the city of Thebes. After the death of Oidipus the two brothers Eteokles and Polyneikes are struggling for the throne of Thebes. They have made a compact which both have sworn to recognize; their rights are supposed to be equal, and it is agreed that they shall rule in turn, the one in odd, the other in even years. But when Eteokles' year is out, he refuses to surrender the throne to his brother, breaks the convention, and indeed scorns the idea of observing obligations imposed by morality or law. His mother exhorts him not to persist in this attitude, but to yield to the commands of justice (*δικαιοσύνη*); he refuses, saying: "If for all alike the same thing were both noble and wise, there would not have been fierce strife among mankind; but as things are, there is no likeness or equality for men except in name; it is otherwise in fact."² And again, "If one is bound to act unjustly, it is most noble to do so for the sake of power; as regards other things one ought to act righteously."³

This is an emphatic repudiation of legal obligation; agreements, according to this view, are mere words; they do not express any realities: this is the key to the dramatic conflict and its tragic solution. The quest for something enduring and fundamental could not, however, be sup-

¹ *Medeia* 534 ff.:

μείζω γε μέντοι τῆς ἐμῆς σωτηρίας
εἰληφας ἢ δέδωκας, ὡς ἐγὼ φράσω.
πρῶτον μὲν Ἑλλάδ' ἀντὶ βαρβάρου χθονὸς
γαίαν κατοικεῖς καὶ δικὴν ἐπίστασαι
νόμοις τε χρῆσθαι μὴ πρὸς ἰσχύος χάριν.

² *EUR. Phoin.* 499 ff.:

εἰ πᾶσι ταῦτὸν καλὸν ἔφην σοφόν θ' ἄμα,
οὐκ ἦν ἂν ἀμφίλεκτος ἀνθρώποις ἔρις·
νῦν δ' οὐθ' ὅμοιον οὐδὲν οὐτ' ἴσον βροτοῖς,
πλὴν ὀνόμασαι· τὸ δ' ἔργον οὐκ ἔστιν τόδε.

³ *Ibid.* 524 f.:

εἴπερ γὰρ ἀδικεῖν χρή, τυραννίδος πέρι
κάλλιστον ἀδικεῖν, τᾶλλα δ' εὐσεβεῖν χρεῶν.

pressed: in spite of perplexing doubts men sought to justify and explain the binding force of law.

In a well-known passage of Sophokles we find expressed another view of law as understood by the Greeks. Law may appear in a sense as a command of nature, as an absolute obligation distinct from the technical requirements of the State. Antigone is defending herself against the charge of having wilfully disobeyed the king's orders; she says to King Kreon: "It was not Zeus that had published that edict; not such are the laws set among men by the Justice who dwells with the gods below; nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth."¹

2. *The Critical Analysis of the Sophists.*

Reference has been made to the Sophistic views presented in the plays of Euripides: indeed the Sophists devoted most attention and ingenuity to problems of conduct and to the criticism of received opinions on which conduct was based. They were keen to inquire and examine into everything, and the more they examined the more they became convinced that absolute notions were groundless. Plato describes the chaos which resulted from their subversive dialectics: "These, my friends, are the sayings of clever men . . . which find a way into the minds of youth. They are told by them that the highest right is might, and in this way the young fall into impiety and entertain the idea that the gods are not such as the law bids them imagine them; and hence arise contentions—the philosophers inviting them to lead a true life according to nature,

¹ SOPH., *Antigone*, 450 ff. :

οὐ γάρ τί μοι Ζεὺς ἦν ὁ κηρύξας τάδε,
οὐδ' ἢ ξύνοικος τῶν κάτω θεῶν Δίκη
τοιούσδ' ἐν ἀνθρώποισιν ὤρισεν νόμους·
οὐδὲ σθένειν τοσοῦτον ὤμην τὰ σὰ
κηρύγμαθ', ὥστ' ἄγραπτα κάσφαλῆ θεῶν
νόμιμα δύνασθαι θνητὸν ὄνθ' ὑπερδραμεῖν·
οὐ γάρ τι νῦν γε κάχθές, ἀλλ' αἰεί ποτε
ξῆ ταῦτα, κοῦδεῖς οἶδεν ἐξ ὄτου 'φάνη.

that is, to live as masters of others, and not in legal subjection to them.”¹

One cannot help being struck by the double aspect of a movement which was unquestionably progressive in the philosophical sense and which at the same time tended to the dissolution of manners, customs, and laws. Ideas which constituted an advance in the domain of thought appeared as a solvent in the social life of the time. The principal problem examined by the Sophists in regard to jurisprudence was how far the basic laws of society can be regarded as ingrained in the nature of things, and how far they are merely artificial establishment. The latter view did not originate with the Sophists themselves, but made its appearance at a much earlier date. In fact its point of departure may be found in a political atmosphere which has nothing to do with the catastrophes of the fifth century. It seems to me that the contrast between *φύσις* and *νόμος* may be traced to Demokritos, and was therefore a product of thought contemporaneous with the Persian War. This philosopher said: “*νόμῳ γλυκύ, νόμῳ πικρόν, νόμῳ θερμόν, νόμῳ ψυχρόν, νόμῳ χροϊή, ἔτεῃ* (v.l. *φύσει*) *ἄτομα καὶ κενόν.*”² It is not easy to interpret this passage, and almost impossible to translate it without explanations. *Νόμος* cannot be simply rendered “law”; stress is laid on its opposition to *ἔτεῃ* (*φύσει*) and therefore a connexion with *νομίζεῖν* seems inevitable. An approximate translation would be: “Things are [deemed] sweet and bitter, hot and cold, and have colour by conventional rule; in reality (or in nature) they are atoms and void.” The peculiar use of the word *νόμος* in this fragment is suggested, as it seems to me, by a perception of the difference between things as they are and things as we take them to be. But it implies at the same time that our formal rules also exist as phenomena, in contrast with *φύσις*.

¹ *Laios* X, 890 a ταῦτ' ἐστίν, ὃ φίλοι, ἅπαντα ἀνδρῶν σοφῶν παρὰ νέοις ἀνθρώποις . . . φασκόντων εἶναι τὸ δικαιοτάτον ὅτι τις ἂν νικᾷ βιαζόμενος ὅθεν ἀσέβειαι τε ἀνθρώποις ἐμπίπτουσι νέοις, ὡς οὐκ ὄντων θεῶν οἴους ὁ νόμος προστάττει διανοεῖσθαι δεῖν, στάσεις τε διὰ ταῦτα ἐλκόντων πρὸς τὸν κατὰ φύσιν ὀρθὸν βίον, ὃς ἐστὶν τῇ ἀληθείᾳ κρατοῦντα ζῆν τῶν ἄλλων καὶ μὴ δουλεύοντα ἑτέροις κατὰ νόμον.

² *DIELS, Fragmente der Vorsokratiker*, II, 3, p. 60, Fr. 9.

A kind of scientific investigation was attempted on this basis in the school of Anaxagoras. We read about an interesting work of one of his pupils, Archelaos: ἔλεγε (Ἀρχέλαος) τὸ δίκαιον εἶναι καὶ τὸ αἰσχρὸν οὐ φύσει ἀλλὰ νόμῳ,¹ "He said that right and wrong existed not by nature but by opinion." The saying appears in connexion with a theory of what we should call transformism. Briefly stated it amounted to this: all things are developed from indistinct matter and the products of matter. They become slowly differentiated, and in the process the initial contrast is that between the warm lower parts and the cold upper parts of the universe. In the warm lower parts, organisms arose out of a kind of protoplasm. They gradually shaped themselves into different forms, and eventually the highest shape was reached in man himself. The next stage was the setting up of leaders, laws, and social rules.² This being so, it is idle to think of any fundamental and permanent justice, and Archelaos says this in as many words. His doctrine may be regarded, in short, as a development of the idea of Demokritos, and amounts to the distinction between νόμος and φύσις. For Archelaos, law resolves itself into a set of historical rules created by gradual evolution.

Such a view allies itself naturally with the teaching of Relativism, which occupied so much place in the philosophy of the Sophists. In the conflict of ideas, people came to the conclusion that everything was in a state of flux, and the first thing to be done in order to arrive at the truth was to take stock of purely subjective notions. This was what Protagoras meant when he said: "Man is the measure of all things." Undoubtedly Protagoras achieved a great stride in philosophy, and many of his views are still considered with respect; but he gave a dangerous instrument to those who wished to misunderstand and misuse his teaching. One of the results of the notions which he advanced was

¹ DIELS, *op. cit.*, I, p. 410, Fr. 1.

² DIELS, I, p. 412 *περὶ δὲ ζώων* (Ἀρχέλαος) φησὶν ὅτι θερμαινομένης τῆς γῆς τὸ πρῶτον ἐν τῷ κάτω μέρει, ὅπου τὸ θερμὸν καὶ τὸ ψυχρὸν ἐμίσητο, ἀνεφαίνετο τὰ τε ἄλλα ζῷα πολλὰ καὶ οἱ ἄνθρωποι . . . καὶ διεκρίθησαν ἄνθρωποι ἀπὸ τῶν ἄλλων καὶ ἡγεμόνας καὶ νόμους καὶ τέχνας καὶ πόλεις καὶ τὰ ἄλλα συνέστησαν.

that, in one at least of its ramifications, concrete individuals were substituted for the abstract conception of man as a psychological unit.¹ Gorgias is the chief representative of this extreme subjectivism. In his philosophy every man has the right to set up his own standard of truth. Of course, if this were so, there would be no general and ultimate truth at all. Logic would have no meaning; and indeed it came to be slighted in the school of Gorgias. This particular group of Sophists sought to develop *Rhetoric* as a substitute for *Logic*, and used "suggestion"—the *ἐνθύμημα*—instead of logical deduction. Too often the object of such Sophists was simply to make the weaker cause appear as the stronger, τὰ ἐλάττω κρείττω ποιεῖν.

Even apart from special pleading, it was not difficult for ingenious persons to attack many positive institutions of the Greek commonwealths. For instance, it was not difficult for Archidamos to show that slavery is no part of the law of nature; or for Lykophron to show that in the natural order of things there is no virtue in mere nobility of birth. It was easy to show that men were not bound to particular spots on the earth, and therefore if a man should happen to find himself in disagreement with the laws or the ideas of his country, he was under no obligation of loyalty to that country. This is what Hippias of Elis meant when he called himself a citizen of the world.² Such sceptics might have appealed to the authority of Demokritos himself, for it was Demokritos who had said: "For the wise man, the whole world lies open."³

In this way relativism came to be a political and social solvent. If then it was impossible to speak of an eternal or immutable law, how were particular forms of law to be regarded? The most important discussion of this problem is to be found in Plato. What was the legal basis of sovereignty in particular States? The view put forward by Sophists (as represented by Plato repeatedly) is that force is the *ultima ratio*. In the view of Thrasymachos, as shown in the *Republic*, if people would only speak without hypo-

¹ Cf. H. RIKKERT, *System der Philosophie*, I, p. 27.

² Cf. K. HILDENBRAND, *Geschichte der Rechtsphilosophie*, I, p. 73.

³ DIELS, II, p. 110, Fr. 247 ἀνδρὶ σοφῶι πάντα γῆ βασιλή· ψυχῆς γὰρ ἀγαθῆς πατρις ὁ ξύμπας κόσμος.

critical pretences, they would say frankly that the law-givers imposed laws which are really in their own interest. Law is therefore nothing more or less than a confirmation of the selfish interests of the rulers. Another view of law is represented by Glaukon, according to whom law is essentially a combination of the weak against the strong. In other words it arises not only because the strong wish to enforce their wills upon the weak, but because the weak combine in order that the strong shall not have everything their own way. Kallikles in the *Gorgias* goes even further than this. He assumes the existence of a league of the weak against the strong, but adds that if an opportunity presents itself, the strong should burst all bonds and do practically what he likes. "Lust and self-will and licence, if they can be indulged in with security, are happiness and virtue."¹ This is, of course, a caricature, but, like all Plato's caricatures, it is suggested by a vivid sense of reality.

A papyrus recently discovered in Egypt throws a strong light on the mixture of acute analysis and moral licence which characterizes the Sophistic movement of the period.² Antiphon the Sophist.

"Justice," says the writer, "consists in not transgressing any of the ordinances of the State of which one is a citizen. A man would therefore exercise justice with most advantage to himself if in the presence of witnesses he held in esteem the laws, but, in the absence of witnesses, the precepts of nature. For the precepts of the laws are adventitious, while those of nature are necessary; the rules of the laws are the product of agreement, not of growth, while those of nature are the product of growth, not of agreement . . . Most of what is just according to law stands in opposition to nature. The law has laid down for the eyes what they ought and what they ought not to see, for the ears what they ought and what they ought not to hear, for the tongue what it ought and what it ought not to say,

¹ PLATO, *Gorgias*, 492 c τρυφή καὶ ἀκολασία καὶ ἐλευθερία, εἰς ἐπικουρίαν ἔχῃ, τοῦτ' ἐστὶν ἀρετὴ τε καὶ εὐδαιμονία. Cf. NETTLESHIP, Lectures on the *Republic*; PÖHLMANN, *Gesch. der sozialen Frage*, I, pp. 557 ff.

² *Oxyrhynchus Papyri*, XI, 1364. ANTIPHON the Sophist. See appendix to chapter, p. 42.

for the hands what they ought and what they ought not to do, for the feet whither they ought and whither they ought not to go, and for the mind what it ought and what it ought not to desire . . . Much of what has been mentioned would be found to be in opposition to nature; greater pain is produced by it when less might be forthcoming, or, on the other hand, less pleasure when more is possible, or injury when injury might be avoided. Now if those who adopted such courses as these had any protection from the laws, whereas those who did not adopt them but opposed them incurred loss, obedience to the laws would not be without advantage; but as it happens, legal justice is found inadequate to protect those who follow legal rules. First of all it allows the injury of the injured and the aggression of the aggressor, and besides the fact that it does not prevent the injured from being injured, nor the aggressor from making aggression, being held over until punishment is inflicted, it is no more favourable to the injured than to the aggressor." The cynicism of this declaration can hardly be surpassed.

Alki-
biades and
Perikles.

The bearing of Sophistic theories on political thought may be illustrated by a story related in the *Memorabilia* of Xenophon,¹ which may possibly be derived from Antisthenes. Perikles, the great statesman and wise man, is said to have been questioned by the irreverent youth, Alkibiades. Asked for his definition of law, Perikles declares it to be "the command of the mass of the people (*τὸ πλῆθος*)."² What then is to be said of an oligarchy? If the sovereign power

¹ XEN. *Mem.* I, ii. 42 Πάντες γὰρ οἱ νόμοι εἰσὶν, οὓς τὸ πλῆθος συνελθὼν καὶ δοκιμάσαν ἐγράψε, φράζον, ἃ τε δεῖ ποιεῖν καὶ ἃ μὴ. . . Ἐὰν δὲ μὴ τὸ πλῆθος, ἀλλ', ὥσπερ ὅπου ὀλιγαρχία ἐστίν, ὀλίγοι συνελθόντες γράψωσιν ὃ τι χρὴ ποιεῖν, ταῦτα τί ἐστί; Πάντα, φάναι, ὅσα ἂν τὸ κρατοῦν τῆς πόλεως βουλευσάμενον, ἃ χρὴ ποιεῖν, γράψῃ, νόμος καλεῖται. Κἄν τύραννος οὖν κρατῶν τῆς πόλεως γράψῃ τοῖς πολίταις ἃ χρὴ ποιεῖν, καὶ ταῦτα νόμος ἐστί; Καὶ ὅσα τύραννος ἄρχων, φάναι, γράφει, καὶ ταῦτα νόμος καλεῖται. Βία δέ, φάναι, καὶ ἀνομία τί ἐστίν, ὧς Περικλῆς; Ἄρ' οὐχ ὅταν ὁ κρείττων τὸν ἥττω μὴ πείσας, ἀλλὰ βιασάμενος, ἀναγκάσῃ ποιεῖν ὃ τι ἂν αὐτῷ δοκῇ; Ἐμοιγε δοκεῖ, φάναι τὸν Περικλέα. Καὶ ὅσα ἄρα τύραννος μὴ πείσας τοὺς πολίτας ἀναγκάζει ποιεῖν γράφων, ἀνομία ἐστί; Δοκεῖ μοι, φάναι τὸν Περικλέα. (κτλ.) Cf. PLATO, *Laws*, IV, 714 c d Τίθεται δῆπου, φασίν, τοὺς νόμους ἐν τῇ πόλει ἐκίστοτε τὸ κρατοῦν. . . Ἄρ' οὖν οἶε, φασίν, ποτὲ δῆμονοι κινήσαντα, ἢ τινα πολιτείαν ἄλλην, ἢ καὶ τύραννον, θήσεσθαι ἐκόνα πρὸς ἄλλο τι πρῶτον νόμους ἢ τὸ συμφέρον ἑαυτῷ τῆς ἀρχῆς τοῦ μένειν; . . . Οὐκοῦν καὶ ὅς ἂν ταῦτα τὰ τεθέντα παραβάνῃ, κολάσει ὁ θέμενος ὡς ἀδικοῦντα, δίκαια εἶναι ταῦτ' ἐπονομάζων;

is in the hands of a few, will not their enactments have the force of law? Perikles admits that they will. What then if the sovereign power is in the hands of one man only? Perikles admits that in this case also the command of the sovereign would have the force of law, although it be imposed by a tyrant. The cross-examination is resumed in the reverse order, beginning with an inquiry as to the imposition of rules by the violence of a tyrant, and proceeding with the analysis of violence (*βία*) in oligarchies and democracies. Eventually Perikles comes to the disappointing conclusion that he cannot offer a satisfactory solution of these embarrassing contradictions!

The difficulty arose, of course, from the fact that States do not rely in practice on law only, but also on force. But the converse is also true: they do not rule merely by force, but also by law. It must be admitted that there is some other power behind the law, but the problem is: What is this power? What is the difference between power (*τὸ κρατοῦν*) and violence (*βία*)? We should answer now that the distinction cannot lie in the mere mechanical arrangement of society, but rather in the recognition of certain extra-legal, moral ties; but it is highly significant that in the Sophistic discussion reported by Xenophon this conclusion is not reached, and the problem remains open in a disconcerting manner.

3. *The Justification of Law.*

The Greek world of the fifth century was full of stir and ferment. But men naturally could not remain content with this confusion, and they addressed themselves to the task of finding some way out of it. They attempted, in short, to justify the existing moral and legal order. After considering the critical point of view in regard to these problems we have now to ask: How was positive law justified as against the doubts and objections of critics and sceptics?

The political psychology of Protagoras.

After all, people had to make up their minds not only to solve such problems in practice, but to explain how, in spite of all the factors making for disintegration, society did exist and hold together. The life of society continues

in spite of selfishness and conflict, and there must be some kind of harmony and organization to keep it up. The attempt to justify positive law and to reconstruct the ideas of right and duty comes originally from the same school of searching criticism which had introduced so many elements of dissolution. This side of its activity has not been sufficiently noticed, as it seems to me, but it is interesting in itself and fraught with important consequences in the course of subsequent development. It was a Sophist, Protagoras, who initiated a considered justification of positive law. He was the principal advocate of the theory of relativism, and it may be said of him that he was in a truer sense than either Sokrates or Plato the originator of a definite theory of jurisprudence. In the dialogue¹ bearing his name Protagoras is asked to explain why people live in States and obey the laws, and why when men are obviously actuated by selfish interests, they still consent to some kind of social regulation; he gives his answer in the form of a myth. His theory is a fiction, but it is the expression of a psychological truth. He tells his interlocutors that the first men were quite helpless and threatened with extermination by wild animals. Prometheus brought them intelligence in order to protect them against this danger. They gathered in cities, but it soon became apparent that intelligence was not sufficient in itself to hold people together in harmony, because they were all selfish, and their interests clashed: they began to fight among themselves instead of fighting the animals. Zeus made a second attempt to save human kind by sending Hermes to

¹ We are met here by a problem of literary criticism: How can we reconstruct the teaching of Protagoras? Only fragments have come down in the works of Plato, who was professedly an opponent of his, and there is therefore considerable difficulty in ascertaining what Protagoras actually did say. There seems, however, to exist a sufficient foundation for reconstructing his main principles. To begin with, whatever liberties Plato may have taken with his references, still he was a great literary artist, and we have no reason to suppose that he reduced things to a mere parody. He always managed to make his people live, and represented them as real characters. Secondly, there is no reason to suppose that Plato disagreed with all the doctrines which he attributed to Protagoras, and he seems to have accepted some of his statements. The doctrine analysed in the text is of this kind, and in any case Plato states it not as a matter of controversy, but merely as a matter of fact.

men with *αἰδώς* and *δίκη*.¹ The word *αἰδώς*, which is sometimes translated "reverence," seems rather to connote "sense of shame," or "conscience."² In a fragment of Demokritos we find the verb *αἰδεῖσθαι* used in this sense: "One ought not to feel ashamed (*αἰδεῖσθαι*) before others more than before oneself, nor should one do evil any the more if no one is likely to know of it than if every one will; but one should respect (*αἰδεῖσθαι*) oneself most and set before one's soul as a principle to do nothing unseemly."³ There is also a remarkable passage in Plato's *Laws*, which describes the transition from *αἰδώς* as "sense of shame," to *ἀναισχυντία* (shamelessness). Plato dwells on the deplorable results of the abuse of freedom: "Men fancying that they knew what they did not know, had no longer any fear (conscience?), and the absence of conscience begets shamelessness (*ἀναισχυντία*). For what is shamelessness but the insolent refusal to regard the opinion of one's betters by reason of an over-daring sort of liberty?"⁴

In addition to self-consciousness and the conscience produced by it, man came to possess henceforth the faculty of judging himself in his relation to others (*δίκη*). These might be described as the social instincts which render possible political union. One of the fundamental ideas of all philosophy and sociology was thus elaborated: the *affectus socialis*, which in later theory was chiefly insisted on by Grotius in contrast with Hobbes. Protagoras discerned in this social instinct two elements—*αἰδώς*, shame or conscience (cf. the Biblical narrative of the Fall of Man), and

¹ PLATO, *Protagoras*, 322 b c ἐζήτουν δὴ ἀθροῖσθαι καὶ σφίζεσθαι, κτίζοντες πόλεις· ὅτ' οὐν ἀθροισθεῖεν ἡδίκουν ἀλλήλους ἅτε οὐκ ἔχοντες τὴν πολιτικὴν τέχνην, ὥστε πάλιν σκεδανύμενοι διεφθείροντο. Ζεὺς οὖν δέισας περὶ τῷ γένει ἡμῶν, μὴ ἀπόλοιτο πᾶν, Ἐρμῆν πέμπει ἄγοντα εἰς ἀνθρώπους αἰδῶ τε καὶ δίκην, ἵν' εἴεν πόλεων κόσμοι τε καὶ δεσμοὶ φιλίας συναγωγοί.

² Cf. BURNET, *Nic. Eth.* IV, c. 9, p. 200.

³ DIELS, *op. cit.* p. 114, fr. 264 μὴδὲν τι μᾶλλον τοὺς ἀνθρώπους αἰδεῖσθαι ἑωυτοῦ μὴδὲ τι μᾶλλον ἐξεργάζεσθαι κακόν, εἰ μέλλει μῆδεις εἰδήσειν, ἢ (εἰ) οἱ πάντες ἀνθρώποι· ἀλλ' ἑωυτὸν μάλιστα αἰδεῖσθαι, καὶ τοῦτον νόμον τῇ ψυχῇ καθεστάναι, ὥστε μὴδὲν ποιεῖν ἀνεπιτήδειον. Cf. PLATO, *Laws*, IV, 713 e for a similar use of *αἰδώς*.

⁴ *Laws*, III, 701 a b συνεφέσπετο δὲ ἐλευθερία· ἀφοβοὶ γὰρ ἐγίγνοντο ὡς εἰδότες, ἢ δὲ ἄδεια ἀναισχυντίαν ἐπέτεκεν· τὸ γὰρ τὴν τοῦ βελτίονος δόξαν μὴ φοβείσθαι διὰ θράσος, τοῦτ' αὐτό ἐστιν σχεδὸν ἢ πονηρὰ ἀναισχυντία, διὰ δὲ τινος ἐλευθερίας λίαν ἀποτετολημένης.

δίκη, or the capacity for judging the actions of man in his relations to others.

Pragmat-
ism.

How does that agree with the principle *homo omnium mensura*? In the *Theaitetos* this question is actually put: If there is no standard of objective truth—if, in other words, every man is his own standard of truth, how can any means be found for men to join together and to live harmoniously in cities and States? In a striking passage¹ Protagoras' solution of this difficulty is presented. It amounts to this: with regard to truth in the abstract, nobody can speak with absolute certainty, and therefore no city can say that its laws are better than those of any other. But while this is undeniable, there is another definite standard which can be ascertained, namely that of *utility*. According to this positive standard, some cities will achieve success, others arrive at deplorable results. Thus in practice the consequences may be taken as a definite and ascertainable standard of reasonable action. This reads like an early example of *pragmatism*. The position, reduced to its simplest elements, is that truth cannot be discovered, but utility can.

Obvious objections may be advanced against this view. As a matter of theory, the standard of utility is as difficult to discover as that of truth. In fact it is much more difficult to arrive at it. When we are dealing with problems of truth, we can at least base ourselves upon logical processes, but when we attempt to discover utility, every one has the right to ask: in what does this utility consist? For whom does it exist? Does it exist for the majority, as Bentham held, or for the "best people," as Aristotle held, or for the superman, as Nietzsche held? And besides all these varying considerations, how is the standard of utility to be applied to States? For instance, in the case of the Peloponnesian war, have we to conclude that

¹ PLATO, *Theaitetos*, 172 a b οὐκοῦν καὶ περὶ πολιτικῶν, κατὰ μὲν καὶ αἰσχρὰ καὶ δίκαια καὶ ἀδίκαια καὶ ὅσια καὶ μὴ, οἷα ἂν ἐκάστη πόλις οἰηθεῖσα θῆται νόμιμα αὐτῇ, ταῦτα καὶ εἶναι τῇ ἀληθείᾳ ἐκάστη, καὶ ἐν τούτοις μὲν οὐδὲν σοφώτερον οὔτε ἰδιώτην ἰδιώτου οὔτε πόλιν πόλεως εἶναι· ἐν δὲ τῷ συμφέροντα εἶναι ἢ μὴ συμφέροντα τίθεσθαι, ἐνταῦθ', εἴπερ που, αὐτὸ ὁμολογήσει σύμβουλον τε συμβούλου διαφέρειν καὶ πόλεως δόξαν ἑτέραν ἑτέρας πρὸς ἀλήθειαν, καὶ οὐκ ἂν πάνυ τολμήσειε φῆσαι, ἃ ἂν θῆται πόλις συμφέροντα οἰηθεῖσα αὐτῇ, παντὸς μάλλον ταῦτα καὶ συνοίσειν.

because Sparta happened to win, her institutions were necessarily better than those of Athens? Anyhow, the pragmatic standard of utility was set up by Protagoras in connexion with his theory of relativism. Each State, according to him, sets up its own principles of justice (*δόξα τῆς πόλεως*), and it is in the competition of practical life that these principles are tried and either approved or found wanting.

What means could be employed to arrive at practical results on this basis? Protagoras considered this question especially in relation to criminal law. The aim of criminal law, he said, is least of all punishment in the sense of retribution. What is done cannot be undone; why then add more evils to those which have already happened? Punishment therefore should be primarily a deterrent, and punitive law is worthless unless it contains some reformatory element.¹ Punishment in the scheme of Protagoras is a measure of social utility. We can discover something of the same kind in modern theories of penology.

Thus we see that there was an attempt on the part of a leading Sophist to explain the working of society and the function of law on the basis of relativism.

Protagoras had laid down that justice is the result of certain social instincts regulated by each State according to its own standard. This view was partly accepted and partly rejected by Sokrates.² He held that each State

Sokrates
and the
δόξα τῆς
πόλεως.

¹ PLATO, *Protag.* 324a b οὐδεὶς γὰρ κολάζει τοὺς ἀδικούντας πρὸς τούτω τὸν νοῦν ἔχων καὶ τούτου ἕνεκα, ὅτι ἠδίκησεν, ὅστις μὴ ὥσπερ θηρίον ἀλογίστως τιμωρεῖται· ὁ δὲ μετὰ λόγου ἐπιχειρῶν κολάζειν οὐ τοῦ παρεληλυθότος ἕνεκα ἀδικήματος τιμωρεῖται—οὐ γὰρ ἂν τό γε πραχθέν ἀγένητον θείῃ—ἀλλὰ τοῦ μέλλοντος χάριν, ἵνα μὴ αἰθὶς ἀδικήσῃ μήτε αὐτὸς οὗτος μήτε ἄλλος ὁ τούτου ἰδῶν κολασθέντα.

² In Sokrates' teaching there are difficulties similar to those which met us in the case of the Sophists. Our chief information comes from Plato, who referred to Sokrates as an exponent not only of the latter's personal teaching, but of his own views. It is therefore impossible to distinguish absolutely between the Platonic and the historic Sokrates; but in spite of this, and of many vexed questions of detail, it is to be remarked that there are points which can be ascertained with considerable confidence in this respect. In some cases the account given by Plato coincides with evidence from other sources. In the particular case which I am about to consider we are able to corroborate Plato's evidence by the statements in Xenophon's *Memorabilia*. Cf. ZELLER, *Socrates*, Chap. V.

should be autonomous in formulating its principles of law, but he based this view not only on the suggestion of social instincts and utility, but also on the requirements of knowledge and thought. In Sokrates' view there is no inherent opposition between natural justice and what is laid down by every State as law; in any case the individual is not called upon to act as an umpire in possible conflicts between these two elements. This was the cardinal view which is emphasized in the *Krito*, and corroborated by the evidence of Xenophon concerning the facts of the trial and condemnation of Sokrates. These facts were, substantially, that when Sokrates had been accused of corrupting the youth, had been found guilty and condemned to death, an attempt was made by his friends to rescue him from prison. It was in connexion with this attempt that Sokrates said emphatically that the State may require from the citizen absolute obedience to its positive laws. Sokrates refused to fly. He did not think it right for a citizen who disagreed with the government of his native land to rebel against its positive enactments. The law of the Commonwealth, he is made to say, is higher than that of father, mother, or ancestors; the right of the city is immeasurably greater than any private right.¹ What the individual has obtained as a kind of unearned increment from the State cannot be balanced by anything else but absolute submission to the laws of the city.

How then was Sokrates' own action to be justified? For it was he above all others who had taught the citizens to differ from received views. Does his teaching, as represented in the *Krito*, mean that the individual is to cease to think for himself? No; the individual has the right to think for himself, and to seek his own way towards right life. Sokrates had been urging all along that he had tried to lead Athens to a better management of her affairs than her ordinary statesmen could devise for her. He said in fact

¹ PLATO, *Krito*, 51 a b ἢ οὕτως εἶ σοφὸς ὥστε λεληθέν σε, ὅτι μητρός τε καὶ πατρὸς καὶ τῶν ἄλλων προγόνων ἀπάντων τιμώτερόν ἐστιν ἢ πατρίς καὶ σεμνότερον καὶ ἀγιώτερον καὶ ἐν μείζονι μοίρα καὶ παρὰ θεοῖς καὶ παρ' ἀνθρώποις τοῖς νοῦν ἔχουσι, καὶ σέβεσθαι δεῖ καὶ μᾶλλον ὑπέικειν καὶ θωπεύειν πατρίδα χαλεπαίνουσαν ἢ πατέρα;

that in teaching and speaking as he did, he was performing a public duty. If then he was now condemned by the very State which he had attempted to serve, how was this conflict to be explained?

Thought is free; no restriction can be placed upon a man's own subjective ideas. But in regard to external conduct, every citizen has entered into an implied contract with the State in which he lives, and on the strength of that contract, if for no other reason, he must submit to the laws which are imposed upon him. He must not only bow to the immense weight of historical tradition, but also recognize the fact that he has enjoyed the protection of the State, and having accepted benefits from it, he must accept unpleasant consequences as well. The State has a right to say to him: If you do not like my ways, you can leave the country. The implied contract therefore is agreed upon as soon as the citizen settles permanently in a city; the counterpart of this is the possibility for him to leave the State.¹ This seems a very harsh view; but at least it was consistent, and moreover it was not only theory, for every day people all over Greece were leaving their native cities because they found themselves in disagreement with social ordinances.

This theory of the implied contract and of the supremacy of State law is supplemented by a less vague and arbitrary doctrine than that of social instinct which culminated in the appeal to *αἰδώς* and *δίκη*. Sokrates' whole teaching is based on a kind of idealistic intellectualism. His chief position was that we have in the human mind a force which makes for combination and unity. This force is reason governed by logic. There is a striking contrast between Sokrates as the artist of dialectics derived from universal logic and Gorgias, the teacher of impressionist rhetoric. The one operated with deductions, the other with suggestions (*ἐνθυμήματα*), and we all remember the con-

The intel-
lectualism
of
Sokrates.

¹ *Krito*, 51 d ἡμεῖς γάρ σε γεννήσαντες, ἐκθρέψαντες, παιδεύσαντες, μεταδόντες ἀπάντων ὧν οἱοί τ' ἡμεν καλῶν σοὶ καὶ τοῖς ἄλλοις πᾶσιν πολίταις, ὅμως προαγορεύομεν τῷ ἐξουσίαν πεποιημένοι Ἀθηναίων τῷ βουλομένῳ, ἐπειδὴν δοκιμασθῆ καὶ ἴδη τὰ ἐν τῇ πόλει πράγματα καὶ ἡμᾶς τοὺς νόμους, ᾧ ἂν μὴ ἀρέσκωμεν ἡμεῖς, ἐξεῖναι λαβόντα τὰ αὐτοῦ ἀπίεσαι ὅποι ἂν βούληται.

temptuous way in which Sokrates refers in Plato's *Apology* to the art of making weak things look strong, τὰ ἐλάττωνα κρείττωνα ποιεῖν, τὸν ἥττω λόγον κρείττω ποιεῖν.¹

As regards law, logic gave a convenient clue to the universal elements underlying local variations. Men communicate their ideas to one another and reflect in common because they possess means of mutual understanding and agreement: there must be some mutual understanding of this kind if we merely wish to avoid quarrels: and this makes it possible to arrive at general results in jurisprudence. For Sokrates, any problem may be solved by conscientious analysis, and the process of searching for admissions and inferences is the key to his eristic method. The implication in regard to jurisprudence is clear. If we can subject evidence to definite logical principles, then even locally different centres of juridical work will eventually produce similar juridical results as regards fundamental problems.

Such are the two main points in Sokrates' doctrine: on the one hand the recognition of the δόξα τῆς πόλεως, in the sense that every State has the right to set up its own legal standards²; and on the other hand the assertion that moral and legal duties are connected primarily with the logical framework of human understanding.

Plato's
solution.

What was Plato's own contribution to the solution of the problem? We need not dwell long on his juridical position, because in spite of Plato's aesthetic power and philosophical depth, his conclusions appear only as an extension of Sokrates' views. There is a most emphatic adherence to the δόξα τῆς πόλεως principle. Why did Plato regard his scheme of the threefold division of society not merely as a device of political wisdom, but as the result of jurisprudential requirements? In his quest of justice, after having tried to derive definitions from individual conduct, he comes to the conclusion that in order to solve the problem it is essential to determine the purpose of the State. Justice, he says, is writ large in the State and writ small in the individual, and if we wish to understand the smaller type,

¹ Cf. GOMPERZ, *Greek Thinkers*, II, iv, pp. 66 ff., and ZELLER, *Socrates*, pp. 87-88 (of Eng. Trans.) (German, Vol. II, pp. 92-3). Cf. p. 23 above.

² Cf. above, p. 34.

we must first understand the larger.¹ Justice cannot be embodied in any single individual: it depends on the harmonization of elements in the State, and all attempts to reconcile individual interests with justice apart from the State are absurd. We must take up the problem, therefore, as being one of political harmony. This view is very emphatically stated in the *Republic*. For Plato the problem hinges entirely on public and not on private law. He dwells on the insufficiency of popular definitions of justice based on the distinction between what is due to a person and what is due to others, and shows that the notion of "due," *ὀφειλόμενον*, as regards any private individual is purely relative.² The measure of rights and claims ought to correspond with the measure of duties, as imposed by the State. Therefore justice is rooted in the wise and permanent distribution of obligations between the classes of citizens. These duties are ranged under the well-known rubrics of *reflection* of philosophers, of *courage* of the defenders, and *industry* of the workers in the State. It would be absurd for the industrial workers to ask for the same range of power as the philosophers, and to grant it to them would not be an act of justice. The rights and duties of the individual must be assigned according to the *δόξα τῆς πόλεως*, and "justice consists in doing one's own business and not being a busybody."³

Let us notice in this connexion a very characteristic passage in the VIIth book of the *Republic*:⁴ "There is a necessary inference from what has preceded, that neither the uneducated and uninformed of truth, nor yet those who never make an end of their education, will be able ministers of State; not the former, because they have no single aim of duty which is the rule of all their actions, private as well as public; nor the latter, because they will not act at all except upon compulsion, fancying that they are already dwelling apart in the Islands of the Blest." Plato here advances the view that the different classes of the people should not only be assigned to their relative places, but

¹ *Republic*, II, 368.

² *Ibid.* I, 332 c.

³ *Ibid.* IV, 433 a τὸ τὰ αὐτοῦ πράττειν καὶ μὴ πολυπραγμαίνειν δικαιοσύνη ἐστίν.

⁴ *Ibid.* VII, 519. Cf. *ibid.* 540 a b.

should be obliged to engage in some form of activity useful to the State. For example, philosophers should not be allowed to lead an entirely contemplative life, but should be made to concern themselves with practical affairs. If they remove themselves entirely from the practical sphere, they are infringing the principle of justice, because the State requires their service, and has a right to demand it. On the other hand, the man in the street ought not to try to thrust himself forward and claim the same privileges as the philosophers. This is the net result of the whole teaching; it was partly inspired by Plato's own bitter experiences in the world of decadent democracy.

Law of
Nature.

In the perplexity which prevailed concerning the basis of morals and law, there was only one way out of the fundamental difficulties, and that was to leave the interpretation of the main problems to the State. But what was the Ideal State which was to act as arbitrator in these differences? Certainly it was not the city as it existed in Plato's own time, and Plato was acutely conscious of the fact. The tragic position of philosophy in the fourth century is that the philosophers proclaimed the doctrine of the *δόξα τῆς πόλεως* at the same time as they found that the *πόλις*, called upon to enunciate this *δόξα*, was bankrupt. In order to steer through these rocks it was necessary to appeal to a universal principle, independent of historical variations and the arbitrary establishments of local laws. All the philosophical schools admit so much, and all turn to *nature* (*φύσις*) as the counterpart of law. But while the representatives of subjectivism and relativism regard the dictates of nature as opposed to the conventional rules decreed by the tyrant *νόμος* (Antiphon, Hippias) and concede to the latter only the value of cunning devices and fictions (Gorgias, Kritias), the idealistic thinkers seek to connect positive laws with an immutable background of natural justice. One may notice the idea already in Demokritos' teaching: "The good and the true (goodness and truth) are the same for all men, but sweetness is different for different people."¹ Fragment 2 shows that Demokritos

¹ DIELS, *Fragmente der Vorsokratiker*, II, p. 77, Fr. 69 *ἀνθρώποις πᾶσι τῶντων ἀγαθὸν καὶ ἀληθές· ἡδὺ δὲ ἄλλοι ἄλλο*. Cf. p. 26 above.

looked to reason as the source of universal truth and justice.¹

Speculation on these lines is, however, much more prominent in Herakleitos' philosophy. While he underlines the contrast between the absolute character of the good as conceived by God with the forms of justice established by men,² he lays stress on the derivation of the latter from the former. There is a common element in justice as well as particular elements, and this common element (*τὸ ξυνόν*) should be defended or contended for (*ισχυρίζεσθαι*) with even greater vigour than in the case of cities defending their laws. And this because all justice comes from God, and value is imparted to all laws from that one source.³ The ground for this belief is found in the universality of human reason.⁴

Thus appears the germ of the idealistic intellectualism which may be regarded as the characteristic feature of Sokrates' teaching, and for which his eristic method provided the dialectical complement. *Φρόνησις, τὸ φρονεῖν*, provided the possibility of evolving certain general principles of justice which may be regarded as commandments of human nature and are therefore superior to the *δόξα τῆς πόλεως*. Sokrates argued on these lines against Hippias according to Xenophon's account in the *Memorabilia*.⁵ With Plato the notion is enlarged in the famous teaching as to "ideas," which, however, is too transcendental to form part of our juridical discussion. In Aristotle's Encyclopaedia the conception of the *νόμος κοινός* as opposed to *νόμοι ἴδιοι* reappears again.⁶ It is, however, characteristic

¹ *Ibid.*, p. 56, Fr. 2 *γίνεται δὲ ἐκ τοῦ φρονεῖν τρία ταῦτα· βουλεύεσθαι καλῶς, λέγειν ἀναμαρτήτως καὶ πράττειν ἃ δεῖ.*

² *Ibid.*, I, p. 98, Fr. 102. BYWATER, *Heracliti Reliquiae*, 61 *τῶι μὲν θεῶι καλὰ πάντα καὶ ἀγαθὰ καὶ δίκαια, ἀνθρώποι δὲ ἃ μὲν ἄδικα ὑπειλίφασι ἃ δὲ δίκαια.*

³ DIELS, Fr. 114. (BYWATER, 91 b) *ξὺν νόμῳ λέγοντας ἰσχυρίζεσθαι χρὴ τῶι ξυνώι πάντων, ὅκωσπερ νόμῳ πόλις, καὶ πολὺ ἰσχυροτέρως. τρέφονται γὰρ πάντες οἱ ἀνθρώπειοι νόμοι ὑπὸ ἐνὸς τοῦ θεῖου· κρατεῖ γὰρ τοσοῦτον ὀκόσον ἐθέλει καὶ ἐξαρκεῖ πᾶσι καὶ περιγίνεται.* Cf. J. L. MYRES, *The Background of Greek Science*, in *California Chronicle*, XVI, no. 4.

⁴ DIELS, Fr. 113. (BYWATER, 91) *ξυνόν ἐστὶ πᾶσι τὸ φρονεῖν.*

⁵ *Mem.* IV, iv.

⁶ *AR. Rhet.* I, x. 1368 b 7 *νόμος δ' ἐστὶν ὁ μὲν ἴδιος ὁ δὲ κοινός. λέγω δὲ ἴδιον μὲν καθ' ὃν γεγραμμένον πολιτεύονται, κοινὸν δὲ ὅσα ἄγραφα παρὰ πᾶσιν ὁμολογεῖσθαι δοκεῖ.* And I, xiii, 1373 b 4 *λέγω δὲ νόμον τὸν μὲν*

of the development of Greek juridical ideas that the "law of nature," though appealed to as a philosophical explanation of existing facts, does not serve as a means for concrete juridical deductions. It is at a later stage—with the advent of Stoicism, especially in its Roman form—that the law of nature began to be considered as a source of law in the practical sense of the term. The explanation of this fact may be found, I think, in the powerful development of equity in the jurisdiction of the democratic courts of the classical period, which left to the popular juries great latitude in the interpretation and application of positive law.

APPENDIX TO CHAPTER II

ANTIPHON the Sophist. *Oxyrh. Pap.* XI. 1364. pp. 96 ff.

Δικαιοσύνη πάντα τῆς πόλεως νόμιμα· ἐν ἣ ἂν πολιτεύηται τις μὴ παραβαίνειν· χρῆτ' ἂν οὖν ἄνθρωπος μάλιστα ἑαυτῶ ξυμφερόντως δικαιοσύνη, εἰ μετὰ μὲν μαρτύρων τοὺς νόμους μεγάλους ἄγοι, μονούμενος δὲ μαρτύρων τὰ τῆς φύσεως· τὰ μὲν γὰρ τῶν νόμων ἐπίθετα, τὰ δὲ τῆς φύσεως ἀναγκαῖα· καὶ τὰ μὲν τῶν νόμων ὁμολογηθέντα οὐ φύντ' ἔστιν, τὰ δὲ τῆς φύσεως φύντ' οὐχ ὁμολογη[θέν]τα . . . τὰ πολλὰ τῶν κατὰ νόμον δικαίων πολεμῖως τῇ φύσει κείται· νενομοθέτηται γὰρ ἐπὶ τε τοῖς ὀφθαλμοῖς ἃ δεῖ αὐτοὺς ὄρᾶν καὶ ἃ οὐ δεῖ· καὶ ἐπὶ τοῖς ὤσιν ἃ δεῖ αὐτὰ ἀκούειν καὶ ἃ οὐ δεῖ· καὶ ἐπὶ τῇ γλώττῃ ἃ τε δεῖ αὐτὴν λέγειν καὶ ἃ οὐ δεῖ· καὶ ἐπὶ ταῖς χερσὶν ἃ τε δεῖ αὐτὰς δρᾶν καὶ ἃ οὐ δεῖ· καὶ ἐπὶ τοῖς ποσὶν ἐφ' ἃ τε δεῖ αὐτοὺς ἰέναι καὶ ἐφ' ἃ οὐ δεῖ· καὶ ἐπὶ τῷ νῶ ὧν τε δεῖ αὐτὸν ἐπιθυμεῖν καὶ ὧν μὴ . . . καὶ τούτων τῶν εἰρημένων πόλλ' ἂν τις εὐροὶ πολέμια τῇ φύσει· ἐνι τε αὐτοῖς ἀλγύνεσθαι τε μᾶλλον ἐξὸν ἦττω· καὶ ἐλάττω ἦδεσθαι ἐξὸν πλείω, καὶ κακῶς πάσχειν ἐξὸν μὴ πάσχειν· εἰ μὲν οὖν τις τοῖς τοιαῦτα προἰεμένοις ἐπικουρήσῃ ἐγίγνετο παρὰ τῶν νόμων, τοῖς δὲ μὴ προἰεμένοις ἀλλ' ἐναντιουμένοις ἐλάττωσθαι, οὐκ ἀνωφελεὲς ἂν ἦν τοῖς νόμοις πείθεσθαι· νῦν δὲ φαίνεται τοῖς προἰεμένοις τὰ τοιαῦτα τὸ ἐκ νόμου δίκαιον οὐχ ἰκανὸν ἐπικουρεῖν· ὅ γε πρῶτον μὲν ἐπιτρέπει τῷ πάσχοντι παθεῖν καὶ τῷ δρῶντι δράσαι, καὶ οὔτε ἐνταῦθα διεκώλυε τὸν πάσχοντα μὴ παθεῖν, οὐδὲ τὸν δρῶντα δράσαι· εἰς τε τὴν τιμωρίαν ἀναφερόμενον οὐδὲν ἰδιώτερον ἐπὶ τῷ πεπονθότι ἢ τῷ δεδρακότι.

ἴδιον τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἐκάστοις ὠρισμένον πρὸς αὐτοὺς, καὶ τοῦτον τὸν μὲν ἄγραφον τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν κτλ. I cannot help thinking that the exposition of the matter by SALOMON in the *Z. SS. Roman. Abth.* XXXIII does not distinguish sufficiently between the various periods.

CHAPTER III

THE LEGAL SYSTEM

1. *Preliminary Notions.*

THE Encyclopaedia of Greek life and thought worked out by Aristotle and his school at the end of the classical period supplies us with invaluable material for connecting philosophical doctrines with actual politics and law. The immense accumulation of data preserved by these encyclopaedists has certain drawbacks. The work was collective, not individual, and therefore not equally sustained even in its most important parts; it was not carefully edited or published as a whole. It consists to a great extent of lectures and surveys, taken down, no doubt, with care, but presenting obscurities and contradictions such as are inevitable when *viva voce* instruction and discussion are reported by listeners. We must not attempt to make everything fit precisely, but have to allow for gaps, misunderstandings, repetitions, and obscure passages, some of which were probably not very clear when the master delivered his lectures.¹

Aristotle's terminology.

Another important question concerns the terms used by Aristotle: their meaning is not to be established simply by reference to the dictionary. The copious information supplied by Bonitz or by Liddell and Scott has to be sifted and classified from the special point of view of the jurist.

¹ A preliminary remark on a literary question may be of some use. An important part of our material comes from the ethical writings. These are not of equal value in themselves, and therefore cannot be of equal authority. The *Nikomacheian Ethics* (Book V) is the most important source, but for terminology and for the clearing up of difficulties we have to turn to the other works. The *Eudemian Ethics*, written by Aristotle's pupil Eudemos, is not parallel to Aristotle's fifth book, but often contains expressions which help to interpret passages of doubtful meaning in the *Nikomacheian* text. The *Ἠθικὰ Μεγάλα*, or *Magna Moralia*, is apparently a report of earlier lectures, and therefore the statements contained in it represent Aristotelian doctrine in a preparatory stage of its development. So much for the general perspective in which I propose to consider the ethical works.

The three terms to be noticed from the very beginning are *δίκαιον*, *νόμιμον*, and *ἴσον*; of these *νόμιμον* is the easiest to translate, as its meaning does not vary: it always stands for the legal (or the lawful), that which is in conformity with law. The other two terms are ambiguous, and Aristotle sometimes gives explanations as to his use of them. In the *Magna Moralia*¹ we find that *δίκαιον* is used in two senses:

1. It is justice as a virtue enjoined by the community and formulated in its laws. Justice therefore covers a wide field; it embraces the conduct of every single citizen in the State, and may be concerned with the most intimate details of his life; for example, under a "paternal" government justice may enjoin us to be temperate; in other words, there may be a law against drunkenness or incontinency. This kind of justice concerns the individual in his relation to the State of which he is a citizen.

2. The second kind of justice is termed "civic" (*πολιτικὸν δίκαιον*)² and is specifically directed towards regulating the relations between citizens; it is justice not between self and the State, but between self and others.

In the *Nikomacheian Ethics* there is a more precise use of terms. Justice as a general conception has to be subdivided into two classes; it is obedience to laws or equitable treatment of neighbours.³ "There is a division of injustice into the illegal and the unequal, and of justice into the legal (or lawful) and the equal (or equitable)." It must be observed that our expression "equitable" should not be used without qualification, because, though it corresponds in part to *ἴσον* in Aristotle's writings, it also

¹ *Magna Moralia*, I, 1193 b ἔστι δὴ διττὸν τὸ δίκαιον, ὧν τὸ μὲν ἐστὶ κατὰ νόμον· δίκαια γὰρ φασιν εἶναι ἃ ὁ νόμος προστάττει. ὁ δὲ νόμος κελεύει. . . ἀπλῶς ἅπαντα ὅσα κατὰ τὰς ἀρετὰς λέγεται. . . ἀλλὰ τὸ δίκαιον τὸ πρὸς ἕτερον ἄλλο. . . ἐστίν. The term τὸ πολιτικὸν δίκαιον for justice of the first kind occurs later on p. 1194 b.

² Cf. *Eth. N. V*, 6, § 4.

³ *Eth. Nik.* V, 2, 1130 b, 8 ff. διώριστα δὴ τὸ ἄδικον τὸ τε παράνομον καὶ τὸ ἄϊσον, τὸ δὲ δίκαιον τὸ τε νόμιμον καὶ τὸ ἴσον. . . ἐπεὶ δὲ τὸ ἄϊσον καὶ τὸ παράνομον οὐ ταῦτόν ἀλλ' ἕτερον ὡς μέρος πρὸς ὅλον. . . καὶ περὶ τῆς ἐν μέρει δικαιοσύνης καὶ περὶ τῆς ἐν μέρει ἀδικίας λεκτέον. . . τῆς δὲ κατὰ μέρος δικαιοσύνης καὶ τοῦ κατ' αὐτὴν δίκαιον ἐν μὲν ἐστὶν εἶδος τὸ ἐν ταῖς διανομαῖς τιμῆς ἢ χρημάτων ἢ τῶν ἄλλων ὅσα μεριστὰ τοῖς κοινωνοῦσι τῆς πολιτείας. . ., ἐν δὲ τὸ ἐν τοῖς συναλλάγμασι διορθωτικόν.

covers the term *ἐπιείκεια* to which we shall come later on. Thus Justice is qualified on the one hand as satisfying the law, on the other as fairness or equality in dealings with others.

In Aristotle's classification of the kinds of justice,¹ we find—(1) General Justice (*τὸ καθόλου δίκαιον*), and (2) Justice as a particular or specific virtue (*τὸ ἐν μέρει δίκαιον*). The first is a complex of all the rules formulated by the State as legally obligatory for the members of the community; the second is the set of rules which govern relations *between* the members of the community. The latter falls into two classes (*a*) Distributive justice (*διανεμητικόν*), and (*b*) Corrective justice (*διορθωτικόν*) or legal redress: (*a*) covers all cases in which an answer is given to the question as to what one person can claim on the ground of just distribution as against others; (*b*) covers all functions of justice directed towards redressing wrongs as between members of the State.

This is the main scheme: by the side of this stands an "annex," which Aristotle calls *ἐπιείκεια*, fairness or equity, not to be distinguished as specific or general, but acting as the correction of both according to circumstances. Another digression occurs in connexion with retaliation or retribution (*τὸ ἀντιπεπονθός*),² a doctrine originating with the Pythagoreans; by considering this doctrine Aristotle is diverted from the main thread of the discussion to the subject of exchange; thus the clear scheme with its three parts—General, Distributive, Corrective—becomes disturbed in exposition.

2. *Corrective Justice.*

We need not follow Aristotle's arrangement, but let us take the simplest part first, reserving the more difficult departments for a later stage. The part which admits of the easiest interpretation is the one relating to corrective justice (*διορθωτικόν*). Here Aristotle proceeds on lines similar to the modern classification, whereas in dealing with the distributive and the general departments he takes up peculiar points of view.

¹ *Loc. cit.*

² *Eth. Nik.* V, 5 1132 b 21, see below, p. 69.

Legal Redress or Corrective Justice falls into two subdivisions; (α) Obligations which are the result of voluntary agreements (*συναλλάγματα ἐκούσια*), and (β) obligations which are not voluntary, but arise from delicts or torts (*συναλλάγματα ἀκούσια*). For example, a man who has inflicted an injury on another is charged with an obligation to make the damage good. This is plain, but the question arises, in what sense contractual obligations can be treated under the heading of *legal redress*. In the case of "breach of contract" the connexion is obvious. One party suffers by the breach, and the Court is asked to give redress. But Aristotle's treatment is wider: he takes the whole range of contract, enumerating sale, loans, security, lease and hire, bailment, deposit.¹

Corrective Justice, in his view, covers not only breaches of conventions, but also their execution. Contractual obligations may remain unfulfilled because one of the parties has misinterpreted the terms of a contract, and thus the question of fitting redress involves the interpretation of the convention.

In enumerating the various forms of agreement, Aristotle does not mention expressly the type of the contract of service, although such conventions occurred in Greece.² They were not, however, very frequent, and we cannot expect an exhaustive enumeration of juridical subdivisions in a philosophical treatise.

Torts.

These relations are treated very much on the same lines as in Roman and modern law: the case is different in regard to delicts. Aristotle's words are worth considering with attention, especially as some commentators seem to have gone astray in their interpretation. He gives examples of the principal kinds of delicts creating obligations.³ They form two groups; (1) those characterized by fraud

¹ *Eth. Nik.* V, 2, 1131 a 2 *πρᾶσις ὧν ἡ δανεισμὸς ἐγγύη χρῆσις παρακαταθήκη μίσθωσις.*

² In Roman law they belong mainly to the group of innominate contracts (according to the formulae *facio ut facias*, *facio ut des*, and *do ut facias*). They might also come under *locatio operarum*. See on the subject BEAUCHEP, *Droit privé*, IV, 221 ff.

³ *Eth. Nik.* V, 2, 1131 a 5 *τῶν δ' ἀκουσίων τὰ μὲν λαθραία, οἷον κλοπή μοιχεία φαρμακεία προαγωγή δουλαπεία δολοφονία ψευδομαρτυρία, τὰ δὲ βία, οἷον αἰκία δεσμὸς θάνατος ἀρπαγή πῆρωσις κακηγορία προπηλακισμός.*

(*λαθραία*), and (2) those characterized by violence (*βίαια*). To the first group belong theft, adultery, poisoning, procuring for immoral purposes, enticing of slaves from their masters, causing death by fraud, and false witness. Some exceedingly "criminal" items have found their way into this category, and the list makes an odd impression on a modern reader. The Greek law of tort is based on principles different from ours; for example, murder was not primarily considered as a crime against the community, but as a private tort to be avenged by the nearest kinsman. Therefore crimes like poisoning, or causing death by fraud, come under this head, and are considered here from the point of view of the damages to be exacted by the injured party. This does not mean, of course, that poisoning, manslaughter, and murder are treated exclusively as private wrongs; the public side is apparent, e.g. in the jurisdiction of the Areiopagos. But the injury to private interests gives rise to claims of the same kind as those against thieves or adulterers. In the second group we find assault, imprisonment, homicide, rape, maiming, slander, contumelious treatment. All these give the injured persons the right to seek compensation.

The treatment of compensation is also peculiar. Aristotle explains the situation by referring to certain mathematical processes¹: disputes covered by distributive justice are to be settled according to geometrical proportion (*κατ' ἀναλογίαν*), whereas compensation in disputes arising out of corrective justice is to be adjudged according to arithmetical proportion (*κατὰ τὴν ἀριθμητικὴν*).² This means that, as regards obligations from delicts, the personal factor does not come in; it is the same if a good man robs a bad man or if a bad man robs a good one; they are equal—the unit being the citizen or man. The points to be considered are the act and the fact, not the person.

It is quite different in the case of distributive justice, because that should be determined in consideration of

¹ *Eth. Nik.* V, 4, 1131 b 32 τὸ δ' ἐν τοῖς συναλλάγμασι δίκαιον ἐστὶ μὲν ἴσον τι, καὶ τὸ ἄδικον ἄνισον, ἀλλ' οὐ κατὰ τὴν ἀναλογίαν ἐκείνην ἀλλὰ κατὰ τὴν ἀριθμητικὴν. οὐδὲν γὰρ διαφέρει, εἰ ἐπιεικῆς φαῦλον ἀπεστέρησεν ἢ φαῦλος ἐπιεικῆ.

² See below, p. 56.

personal values. Advantage ought to stand to advantage in quantity as man stands to man in quality.

The case of corrective justice may be made clear by an example. Suppose that some furniture has been stolen; the fact of the theft sets in motion a process of restitution and compensation: a certain quantity of goods has been carried away from the legal sphere of one individual to the legal sphere of another. Justice must first restore the things to their original owner; but this is not enough; compensation goes further than restitution. Besides the material damage suffered by the aggrieved party, there is a moral element to be accounted for; the disturbance of economic order, the feeling of humiliation, the sense of loss and indignity, have to be estimated, and the moral injury must be made good as well as the material one. The point may be well illustrated by a reference to the speech of Isokrates against Lochites.¹ He says: "If there had been no contumely attached to my opponent's action, I should not have come before you; but as it is I come to obtain redress from him, not merely for the damage arising out of the blows, but for the assault and dishonour, for which it is right that free men should feel the greatest indignation and should obtain the highest reparation. I see that when you convict a man of temple robbery or theft you do not assess the penalty in proportion to the amount stolen, but you condemn all alike to death, and consider it just for those who attempt the same crimes to be punished by the same penalties. You ought then to hold the same view as regards those guilty of contumelious aggression, and not to ask whether the blow was very severe, but whether the law was broken, and to exact redress not for the particular circumstance only, but for the conduct of the aggressors as a whole."

Moreover, the penalty (*ζημία*) must be made commensurate with the advantage (*κέρδος*) which the thief had in mind when he committed his crime.² In the case of crimes of violence it is especially obvious that the moral damages

¹ ISOKRATES, XX, 396 c.

² *Eth. N. V*, 4, 1132 a πειράται τῇ ζημίᾳ ἰσάζειν, ἀφαιρῶν τοῦ κέρδους. . . ὥστε τὸ ἐπανορθωτικὸν δίκαιον ἂν εἴη τὸ μέσον ζημίας καὶ κέρδους.

have to be considered, but in all cases the estimation of these damages presents problems which are sometimes very complex. Modern illustrations of the view that moral injury should be considered in assessing damages may be found in cases of breach of promise of marriage, or of seduction.

The necessity of restoring the disturbed equilibrium by bringing the goods back to their owner and appreciating the moral loss is clear; but the question is, how is this to be done? The Athenian courts had recourse to the process called *τίμησις*, assessment. When the person had been found guilty, then came the question of damages. In the so-called *ἀγῶνες ἀτίμητοι* the amount of the fine was determined beforehand by law; in the *ἀγῶνες τιμητοί*, on the contrary, the assessment was left to the jury. The procedure about which we hear most is the competitive proposal of assessment made by plaintiff and defendant. The jury had to choose between the two, and usually it was impossible for them to vary the estimates. If the court had consisted of a few expert judges it would have been comparatively easy to do so; even with the numbers constituting a modern jury, the assessment can be left to their deliberation and verdict; but in the huge Heliastic Courts, consisting at least of 201, often of 401, sometimes even of 1,001 members, nothing like systematic discussion could be allowed. The defects of the competitive procedure were recognized, and Aristotle tells us of a different method of voting advocated by Hippodamos of Miletos,¹ who suggested that jurors, instead of receiving only the voting-counters (*ψῆφοι*), should be provided with tablets (*πινάκια*) on which every one could note what he thought best. Aristotle criticizes this suggestion in some detail.² "Neither is the law to be commended which says that the judges, when a

The
assessment
of
damages.

¹ *Pol.* II, 1268 a.

² *Ibid.* 1268 b οὐ καλῶς δ' οὐδ' ὁ περὶ τῆς κρίσεως ἔχει νόμος, τὸ κρίνειν ἀξιῶν διαιροῦντα τῆς κρίσεως ἀπλῶς γεγραμμένης, καὶ γίνεσθαι τὸν δικαστὴν διαιτητήν. τοῦτο δ' ἐν μὲν τῇ διαίτῃ καὶ πλείοσιν ἐνδέχεται (κοινολογοῦνται γὰρ ἀλλήλοις περὶ τῆς κρίσεως), ἐν δὲ τοῖς δικαστηρίοις οὐκ ἔστιν, ἀλλὰ καὶ τοῦναντίον τοῦτ' ὅν νομοθετῶν οἱ πολλοὶ παρασκευάζουσιν ὅπως οἱ δικασταὶ μὴ κοινολογῶνται πρὸς ἀλλήλους. ἔπειτα πῶς οὐκ ἔσται ταραχῶδης ἡ κρίσις, ὅταν ὀφείλει μὲν ὁ δικαστὴς οἴηται, μὴ τοσοῦτον δ' ὅσον ὁ δικαζόμενος; . . . δῆλον ὅτι μεριῶσιν (οἱ δικασταί). . . τίς οὖν ὁ τρόπος ἔσται τῆς διαλογῆς τῶν ψήφων;

simple issue is laid before them, should make distinctions in their judgement; for the judge is thus converted into an arbitrator. Now, in an arbitration, although the arbitrators are many, they confer with one another about the decision, and therefore they can draw distinctions; but in courts of law this is impossible, and, indeed, most legislators take pains to prevent the judges from holding any communication with one another. Again, will there not be confusion if the judge thinks that damages should be given, but not so much as the suitor demands? The latter asks, say, for twenty minae, and the judge allows him ten minae, or one judge more and another less; one five, another four minae. In this way if they will go on apportioning the damages, and some will grant the whole and others nothing, how is the final reckoning to be made? Indeed, no one who votes for a simple acquittal or condemnation is compelled to perjure himself, if the indictment is quite simple and in right form; for the judge who acquits does not decide that the defendant owes nothing, but that he does not owe the twenty minae. He only is guilty of perjury who thinks that the defendant ought not to pay twenty minae, and yet condemns him."

This concluding remark implies that it was in the interest of the plaintiff not to put up his claim too high, because he endangered his case thereby before the jury.

The procedure in the first instance evidently took place in most cases before the arbitrators (*διαιτηταί*), and even in those cases which were submitted to Heliastic tribunals various magistrates had the preliminary investigation (*ἀνάκρισις*), which must have included proposals as to assessment.¹ We have some evidence that it was possible for a court to adjudicate a supplementary assessment by some process which is unfortunately not described in detail; a case in point is referred to in the speech of Demosthenes against Meidias.² "The people resolved that Evander the Thespian was guilty of a contempt of the Mysteries, upon a complaint brought against him by Menippos, a Karian.

¹ Plato has something of the same kind in view when he is treating of agrarian disputes in *Laws*, VIII, 844.

² DEM. XXI, 175, 6, p. 571, 2 (cf. Kennedy's translation).

He had obtained a verdict against Menippos in a mercantile cause, and being unable (as he said) to catch him before, he seized his person while staying here at the Mysteries. When he (Evander) came into court, you were disposed to punish him with death, but, the complainant coming to terms, you compelled him to forgo the whole of the judgement which he had formerly recovered, amounting to two talents, and to pay such damages as the man computed he had sustained by stopping to prosecute."

We know that the case arose out of a *προβολή*¹ introduced before a Heliastic commission by the *θεσμοθέται*, and the punishment inflicted by the tribunal must have been the result not of a proposal by the accuser, but of a *προστίμησις*. Thus the courts were not absolutely bound by the proposals of plaintiff and defendant as to the assessment.

3. *Distributive Justice.*

If we turn now to Distributive Justice, a clear definition of it is supplied in the chapter of the *Ethics* referred to above²; Distribu-
tion of
property. "it is concerned with the distribution or division of honours or of property or of other things which may have to be divided between the members of a community." We have to reckon, therefore, with either the simple case of property coming up for division (e.g. an inheritance), or the more complex case of the distribution of honours or dignities (*τιμαί*). Occasions for a division of property arise under any system. In the treatise on the Athenian Constitution³ there is a reference to the duty of the First Archon to receive claims in the process of so-called *δατητῶν αἵρεσις*, the granting of umpires to distribute property among heirs who could not agree as to respective shares. According to Harpokration, *δατητῶν αἵρεσις* also took place in the case of any kind of distribution of *κοινά* (*communia*); these proceedings correspond in Roman law to actions *familiae erciscundae* and *communi dividundo*.

¹ See below, p. 63.

² *Eth. Nik.* V, 2, 12, 1130 b. See above, p. 44. Cf. *Pol.* IV (VII), 1326 b 15, and 1330 a 2 ff.; also *Top.* VI, 143 a, 145 b.

³ *Ath. Const.* 56 εἰσάγει . . . εἰς δατητῶν αἵρεσιν, εἰάν τις μὴ θέλη κοινὰ τὰ ὄντα νέμεσθαι.

Another occasion on which distributive justice is seen in practice is the foundation of a colony. We have the evidence of inscriptions to show us what was done. For example, there is the document relating to the foundation of Brea about the year 444 B.C.¹ Ten men were to be chosen, one from each tribe, to divide the land; in this way κληροί, allotments, or family holdings, were formed. The conception of the κληρος is an ancient and universal one in Greek law. The κληρος is a plot of land intended to form the basis of subsistence for a household, and corresponding to the standard of a citizen family. The principle obviously required equal distribution in the course of colonization, and even in Athens an effort was made to keep up the tradition of the old κληροί; according to the testimony of Aristotle a law of Solon prohibited the accumulation of property in land.² It was the special duty of the Archon Eponymos to watch over the preservation of families (οἴκοι) in the sense of units of property.³

Distribu-
tion of
honours
and
profits.

Thus, as regards the division of property, the meaning of the term "distributive justice" is sufficiently clear; but it applies also to the division of offices, honours, and privileges (τιμαί). Here we enter on a subject treated in a very peculiar manner by the Greeks. On account of the intimate connexion between politics and law all the Greeks recognized that there must be a correspondence between the duties and the rights of the members of a community. In the *Ethics* Aristotle says: "He who does not do any good to the community does not get honoured; the community is assigned to him who benefits the community; dignities are of the community."⁴ People disagreed, however, as to the principle on which such a distribution should be effected. To quote again from the *Ethics*: "In distribution all men agree that what is just must be in accordance with a value of some kind, but they do not all adopt

¹ DITT. *Syll.*³ I. 67, p. 83 γεονόμος δὲ ἐλέσθαι δέκα ἄνδρας ἕνα ἐχ φυλῆς. οὗτοι δὲ νεμάντων τὴν γῆν.

² *Pol.* II, 7, 1267 b.

³ *Ath. Const.* c. 56.

⁴ *Eth. Nik.* VIII, 14, 1163 b 6 οὐ γὰρ τιμᾶται ὁ μηδὲν ἀγαθὸν τῷ κοινῷ παρίστων· τὸ κοινὸν γὰρ δίδεται τῷ κοινῷ εὐεργετοῦντι, ἢ τιμῇ δὲ κοινόν. Cf. *Pol.* II, 1266 b, and III, 1278 a.

the same standard of value; in democratic States they take free birth as the standard, in oligarchic States wealth, or nobility of birth, in aristocracies virtue."¹ This discussion as to justice is, of course, closely connected with political theory, and the clearest embodiment of the principle is to be found in timocratic constitutions, where rights and duties were graduated according to classes determined by relative wealth. In general the right to hold office was brought into relation to the performance of civic functions, and in case of doubt the ultimate decision rested with the courts.

In order to make this point clear, and to show the working of the principle in practice, a few simple cases may be cited.

1. Election to a public office or dignity (*ἀρχή*). After the election by lot a procedure of "estimation" (*δοκιμασία*) had to be gone through, by which the fitness of the candidate was tested. Stress was laid on the question whether the person who aspired to be a member of the government had served the city by contributing to its expenses and sharing in its burdens. As to this process we have e. g. the evidence of three speeches of Lysias,² making it clear that there was an actual distribution (*διανομή*) of offices. On behalf of a defendant Lysias tried to prove that his client claimed the dignity by right, because he had done good service to the commonwealth; on the other hand, as an accuser he contested elections on the ground that the candidate did not come up to the standard in respect of services to the State.

2. Privileges of citizenship. Besides the actual offices of the State, there were special rights and privileges attached to the possession of citizenship. In Athens, which was for some time at the head of an Empire, citizens drew all sorts of benefits from their position in the city. In the twenty-fourth chapter of the *Athenian Constitution* we find a list

¹ *Eth. Nik.* V, 3, 1131 a 25 τὸ γὰρ δίκαιον ἐν ταῖς νομαῖς ὁμολογοῦσι πάντες κατ' ἀξίαν τινὰ δεῖν εἶναι, τὴν μὲντοι ἀξίαν οὐ τὴν αὐτὴν λέγουσι πάντες ὑπάρχειν, ἀλλ' οἱ μὲν δημοκρατικοὶ ἐλευθερίαν, οἱ δ' ὀλιγαρχικοὶ πλοῦτον, οἱ δ' εὐγένειαν, οἱ δ' ἀριστοκρατικοὶ ἀρετὴν.

² XVI, XXVI, XXXI.

of the advantages which could be claimed in this way¹; we are told that more than 20,000 Athenians possessed rights which materialized in the form of various payments and bonuses. At the head of the list stand the Heliasts, the jurymen in the Courts, then come the members of the Council, archers, horsemen, citizens performing garrison service, city police, etc.

Public
assist-
ance.

This condition of affairs was not one of purely political exploitation; it was the result of the performance of administrative and judicial duties. Again, Athens, wealthy city as she was, had introduced a system of doles or pensions for citizens disabled by wounds, sickness, and old age. It amounted in some cases only to an obol a day, but for the poor it was an important matter, as is shown by a speech of Lysias delivered before the Council.² The speaker's plea is that he is destitute, and would be lost if he were deprived of the daily obol. The man was accused of having cheated the State, inasmuch as he was possessed of some means, while he had been exempted from public dues, and was receiving public assistance. He defended himself against the charges made: "My adversary maintains that I am sufficiently strong and well-off, that I can afford to ride horses, and that I make money by my craft, that I am seen in the company of rich men." He denies

¹ *Ath. Const.* c. 24 . . . κατέστησαν δὲ καὶ τοῖς πολλοῖς εὐπορίαν τροφῆς, ὥσπερ Ἀριστείδης εἰσηγήσατο. συνέβαιεν γὰρ ἀπὸ τῶν φόρων καὶ τῶν τελῶν καὶ τῶν συμμάχων πλείους ἢ δισμύριους ἄνδρας τρέφεσθαι. δικασταὶ μὲν γὰρ ἦσαν ἑξακισχίλιοι, τοξόται δ' ἑξακόσιοι καὶ χίλιοι, καὶ πρὸς τούτοις ἵππεῖς χίλιοι καὶ διακόσιοι, βουλὴ δὲ πεντακόσιοι, καὶ φρουροὶ νεωρίων πεντακόσιοι, καὶ πρὸς τούτοις ἐν τῇ πόλει φρουροὶ ὅ, ἀρχαὶ δ' ἐνδημοὶ μὲν εἰς ἑπτακοσίους ἄνδρας, ὑπερόριοι δ' εἰς ἑπτακοσίους· πρὸς δὲ τούτοις ἐπεὶ συνεστήσαντο τὸν πόλεμον ὑστερον, ὀπλίται μὲν δισχίλιοι καὶ πεντακόσιοι, νῆες δὲ φρουρίδες εἴκοσι, ἄλλαι δὲ νῆες αἰ τοὺς φόρους ἀγοῦσαι τοὺς ἀπὸ τοῦ κνάμου δισχίλιους ἄνδρας, ἔτι δὲ πρυτανεῖον καὶ ὄρφανοὶ καὶ δεσμοτῶν φύλακες· ἅπασι γὰρ τούτοις ἀπὸ τῶν κοινῶν ἡ διοίκησις ἦν.

² *LYSIAS, XXIV, 4* φησὶ γὰρ ὁ κατήγορος οὐ δικαίως με λαμβάνειν τὸ παρὰ τῆς πόλεως ἀργύριον· καὶ γὰρ τῷ σώματι δύνασθαι καὶ οὐκ εἶναι τῶν ἀδυνάτων, καὶ τέχνην ἐπίστασθαι τοιαύτην ὥστε καὶ ἄνευ τοῦ διδομένου τούτου ζῆν. καὶ τεκμηρίους χρῆται τῆς μὲν τοῦ σώματος ῥώμης, ὅτι ἐπὶ τοὺς ἵππους ἀναβαίνω, τῆς δ' ἐν τῇ τέχνῃ εὐπορίας, ὅτι δύναμαι συνεῖναι δυναμένοις ἀνθρώποις ἀναλίσκειν. . . . πρόσθε δὲ μοι οὐκ ἔστιν ἄλλη πλὴν ταύτης, ἣν ἂν ἀφέλησθέ με, κινδυνεύσαιμ' ἂν ὑπὸ τῇ δυσχερεστάτῃ γενέσθαι τύχῃ. μὴ τοίνυν, ἐπειδὴ γε ἔστιν, ὦ βουλὴ, σῶσαι με δικαίως, ἀπολέσητε ἀδικῶς· . . . μὴδ' ἐμὲ τολμήσαντες ἀδικῆσαι καὶ τοὺς ἄλλους τοὺς ὁμοίως ἐμοὶ διακειμένους ἀβημήσαι ποιήσητε.

that these are really indications of wealth, and claims that he is truly entitled to the scanty help which he enjoys.

Aristotle's remark has been quoted above, that the principle of distribution in a democracy is *ἐλευθερία*, freedom (of birth). This could on occasion be made a very stringent test; for example, in 445 B.C., an incident¹ occurred which led to a considerable decrease in the number of free citizens. A fleet from Egypt arrived, bringing a supply of corn to Athens, and the problem of the distribution of the corn had to be solved. A revision in the *Demoi* followed (*διαψήφισις*), and in consequence about 5,000 persons lost their status as free citizens (*ἐλευθερία*).

3. Public burdens (*λειτουργίαι*), in the shape of heavy expenses undertaken by citizens in fitting out ships, equipping embassies, providing dramatic choruses, etc. The result of the principle of correspondence between needs, services, and dignities was that an exchange of property (*ἀντίδοσις*) might be demanded by the overtaxed party. The procedure is foreign to modern ideas, but very characteristic of Greek politics. Isokrates pretends to have made use of it in his defence against charges of bad citizenship. It was said of him that he was so rich that he ought to be on the roll of persons liable to contributions, and as a result of legal proceedings his name was entered on the roll. The extant speech on the *Ἀντίδοσις* is not the one actually delivered at the time, but a literary version published afterwards; the arguments, however, are no less significant. The speech of Demosthenes on the same subject² is probably genuine, and certainly forensic. A citizen challenged another on the ground that he was richer than himself, and ought to be on the roll of the *λειτουργίαι*, as the division of burdens ought to be proportioned to wealth. Accordingly both households were put under seal, and watchmen guarded the property until the valuation could be made. The complaint made in the speech is that Phainippos had broken the seals and removed a portion of his goods.

Public
burdens.

¹ This incident is mentioned by Plutarch in his *Life of Perikles* (c. 37), and also by a scholiast on Aristophanes' *Wasps* (v. 718). Both derived their information from the antiquarian Philochoros.

² DEM. XLII.

Proportionate standards.

The general conclusion arrived at by Aristotle points to a correspondence in accordance with geometrical proportion between a man's social value and his claims to honour. He draws a distinction between equality in number ($\acute{\alpha}\rho\iota\theta\mu\acute{\omega}$) and equality in proportion ($\lambda\acute{o}\gamma\omega$).¹ Thus citizen A should lay claim to certain advantages m according to his general qualifications or status, against citizen B, whose claims may be estimated at n . The symbols may represent any amount, and the advantages so represented may take any form; the point is that the relations between A and B and between m and n must be the same. Taking an illustration from actual numbers, one might say that the relation of 20 to 10 is the same as that of 6 to 3, although 20 and 6, 10 and 3, represent different quantities.

That this is not merely a personal theory of Aristotle's is clear from a passage in Isokrates' *Areiopageitikos*; he refers to the earlier timocratic form of government as the best, and extols the Athenians of that age for recognizing an equality which was not absolute, but proportionate. He says: "A very important factor in the good government of the city at that time was that of the two kinds of equality recognized—the one giving the same to all, and the other giving each his due: they were well aware which was the more profitable. That kind which considers the good and the bad worthy of the same rewards they rejected as not just; that which honours each man according to his worth they adopted, and in accordance with it they governed the city, not electing magistrates by lot from the whole people, but choosing out the best and the most competent for each function."²

In Aristotle's view the standard of distribution ought to be civic virtue; and our whole reading of his work must be determined by the fact that he starts with a political ideal of this kind. We may ask what a democratic states-

¹ AR., *Eudemian Ethics*, VII, 1242 b $\acute{o}\tau\acute{\epsilon}$ $\mu\acute{\epsilon}\nu$ $\gamma\acute{\alpha}\rho$ $\acute{\alpha}\rho\iota\theta\mu\acute{\omega}$ $\tau\omicron\upsilon$ $\acute{\iota}\sigma\omicron\upsilon$ $\mu\acute{\epsilon}\tau\acute{\epsilon}\chi\omicron\upsilon\sigma\iota\nu$, $\acute{o}\tau\acute{\epsilon}$ $\delta\acute{\epsilon}$ $\lambda\acute{o}\gamma\omega$. $\epsilon\acute{\iota}$ $\mu\acute{\epsilon}\nu$ $\gamma\acute{\alpha}\rho$ $\acute{\iota}\sigma\omicron\upsilon$ $\acute{\alpha}\rho\iota\theta\mu\acute{\omega}$ $\epsilon\acute{\iota}\sigma\eta\gamma\epsilon\gamma\kappa\epsilon\nu$ $\acute{\alpha}\rho\gamma\acute{\upsilon}\rho\iota\omicron\nu$, $\acute{\iota}\sigma\omicron\upsilon$ $\kappa\alpha\acute{\iota}$ $\tau\acute{\omega}$ $\acute{\iota}\sigma\omega$ $\acute{\alpha}\rho\iota\theta\mu\acute{\omega}$ $\delta\iota\alpha\lambda\alpha\mu\beta\acute{\alpha}\nu\omicron\upsilon\sigma\iota\nu$, $\epsilon\acute{\iota}$ $\delta\acute{\epsilon}$ $\mu\grave{\eta}$ $\acute{\iota}\sigma\omicron\upsilon$, $\acute{\alpha}\nu\acute{\alpha}\lambda\omicron\gamma\omicron\nu$ $\delta\epsilon\acute{\iota}$ $\acute{\alpha}\rho\alpha$ $\tau\iota\nu\acute{\iota}$ $\acute{\epsilon}\tau\acute{\epsilon}\rho\omega$ $\acute{\alpha}\mu\acute{\iota}\sigma\acute{\alpha}\sigma\alpha\iota$ $\kappa\alpha\acute{\iota}$ $\pi\omicron\iota\eta\sigma\alpha\iota$ $\acute{\alpha}\nu\acute{\alpha}\lambda\omicron\gamma\omicron\nu$. $\tau\omicron\upsilon\tau\omicron$ δ' $\acute{\epsilon}\sigma\tau\acute{\iota}\nu$ η $\tau\iota\mu\acute{\eta}$, . . . $\delta\epsilon\acute{\iota}$ $\delta\acute{\epsilon}$ $\acute{\iota}\sigma\alpha$ - $\sigma\theta\eta\eta\alpha\iota$ $\tau\omicron$ $\kappa\acute{\epsilon}\rho\delta\omicron\varsigma$ $\pi\rho\acute{\sigma}$ $\tau\eta\nu$ $\tau\iota\mu\acute{\eta}\nu$. Cf. *Pol.* III, 1281 a 31 $\tau\iota\mu\acute{\alpha}\varsigma$ $\gamma\acute{\alpha}\rho$ $\lambda\acute{\epsilon}\gamma\omicron$ - $\mu\epsilon\nu$ $\acute{\epsilon}\nu\alpha\iota$ $\tau\acute{\alpha}\varsigma$ $\acute{\alpha}\rho\chi\acute{\alpha}\varsigma$. Cf. also *Magn. Mor.* I, 1195 b; see below, p. 57.

² ISOKRATES, VII, 21, 22.

man of the type of Kleon—one who had broken with the old tradition of timocracy and aristocracy—would say about such a conception. He would, no doubt, disagree as to virtue being the standard, but would certainly have insisted on *ἐλευθερία*, and worked out the other aspect of the doctrine, viz., that the rich and influential should be made to pay for their advantages by being burdened with heavier duties and expenses.¹

Does Distributive Justice cover not only the distribution of property, but also its protection? Supposing some one claims to have a better right to certain goods than their actual possessor—is that a case for distributive justice? There is no reason for treating the case under that head, as claims to things depend in this case on title and not on estimates; the proper place for it in the system described by Aristotle is under the heading of General Justice.

4. *Justice in General* (ἡ καθόλου δικαιοσύνη).

In comparison with the modern classification, Aristotle's general justice covers two great divisions—public law and the law of things (*jus in rem*)—and a large part of a third, namely, of the law of persons. We read in the fifth book of the *Ethics*: “The acts which manifest complete virtue form, we may say, the bulk of the acts which are in accordance with law; for the law orders us to display all the virtues and none of the vices in our lives. But the acts which tend to produce virtue are those legal acts which are prescribed with reference to the education of man as a citizen.”² In positive legislation, the principle of equality does not hold good as a leading requirement; inequalities may be necessary for the sake of public utility. The inequalities between citizens, denizens (*μέτοικοι*), freedmen

¹ *Eth. Nik.* VIII, 14, 1163 b 10 τῷ δὲ περὶ χρήματα ἐλαττουμένῳ τιμὴν ἀπονέμουσι καὶ τῷ δωροδόκῳ χρήματα. Cf. above, p. 52. Cf. *Magn. Mor.* I, 1195 b πάντες γὰρ οἱ ἐλαττον λαμβάνοντες ἀντικαταλλάττονται ἢ τιμὴν ἢ ἔπαινον ἢ δόξαν ἢ φιλίαν ἢ ἄλλο τι τῶν τοιούτων.

² *Eth. Nik.* V, 2, 1130 b 22 σχεδὸν γὰρ τὰ πολλὰ τῶν νομίμων τὰ ἀπὸ τῆς ὅλης ἀρετῆς πραττόμενά ἐστιν· καθ' ἑκάστην γὰρ ἀρετὴν προστάττει ζῆν καὶ καθ' ἑκάστην μοχθηρίαν κωλύει ὁ νόμος. τὰ δὲ ποιητικὰ τῆς ὅλης ἀρετῆς ἐστὶ τῶν νομίμων ὅσα νενομοθέτηται περὶ παιδείαν τὴν πρὸς τὸ κοινόν.

and slaves are of this kind. Positive enactments may be independent of our moral conceptions; take, for example, the case of the attitude of the citizens of Amphipolis in relation to the cult of Brasidas;¹ there was nothing immoral in not wanting to join in this worship, but the enactment was binding for them, it was part of the religion of their State.

Thus in the field of General Justice the State maintains by legislation its standards of compulsory morality and political expediency; duties correspond to virtues, crimes to vices. Accordingly it is under this heading that we have to look for criminal justice. It is not to be found under the head of Corrective Justice, although the Greeks certainly realized that theft, rape, murder, etc. were crimes affecting the city (*δημόσια*) and not mere private wrongs. Accordingly laws inflicted punishments in a number of cases apart from any compensation.

Controversies as to rights.

The second class of rights which are to be derived from General Justice, as expressed in positive enactments, are the rights of property and possession. They give rise primarily to so-called *ἀμφισβητήσεις*, disputes; these are characterized by the fact that there is no plaintiff and no defendant in them; the parties stand both in the same position in the trial, both seeking to ascertain their right, and to have it declared. This variety is represented in procedure by the form of process called *διαδικασία*, a special kind of trial arising in cases where no one asserts that there is any wrong on the side of the opponent, but each party insists on his supposed right. The process was chiefly used for the protection of those rights which might be called rights of *tenure* or property.² The fact that *διαδικασία* treats of rights of tenure protected by the State as long as no better title has been produced is shown by the definition given, e.g. in the *Lexica Segueriana*;³ the aim of the action is only to establish and maintain the strongest claim. Thus there is a clear contrast with the Roman *rei vindicatio*.⁴

¹ *Eth. Nik.* V, 7, 1134 b, 23.

² See below, Chap. X, p. 221.

³ *Lexica Segueriana*, ed. Bekker οὐχ ἀπλῶς πᾶσα δίκη διαδικασία καλεῖται, ἀλλ' ἐν αἷς περὶ τινος ἀμφισβήτησις ἐστὶν ὅφ' προσήκει μᾶλλον.

⁴ LIPSIUS, *Att. Recht und Rechtsverfahren*, p. 463, is of a different opinion.

Turning to the actual material for the study of the process in the extant forensic speeches we find nothing treating of rights to property derived from purchase, but several speeches on rights derived from inheritance. Very conspicuous instances are presented by Isaios' speech on the estate of Hagnias,¹ and those of Demosthenes against Makartatos and Leochares;² in the last there is a discussion of a very difficult point of Athenian law, namely, the relative standing of a person claiming kinship as against a posthumously adopted son of the last owner. Other examples of *διαδικασία* concern religious offices, which were of importance, naturally, as sources of income.

If we compare these cases with those of Roman, English, or French law, we find that under the latter systems it was advisable to try to get possession before urging one's claim to the title. The historical explanation of this consists in the fact that Praetorian law developed as a system working against the principle of "self-help" by means of interdicts, e.g. *uti possidetis* or *utrubi*. The introduction of interdicts was intended as a substitute for juridical self-help, which was one of the most powerful agents in the archaic process of securing right. While the executive power of the State was weak, it had to let people make their claims good on their own initiative, e.g. by *pignoris capio* or *manus injectio*. As the authority of the State developed, these methods became obsolete and undesirable—in fact dangerous to society—and the State began to assert its judicial monopoly. The gradual restriction of self-help led also in French and English law to a procedure aiming first of all at protecting or securing possession and relegating the trial as to rights to a subsequent stage.

It may be asked whether there was in Greek law anything similar to that procedural relation between possession and title.³ It may seem that lawful possession was protected in accordance with a passage in the *Athenian Constitution* containing a notice of a proclamation by the First

¹ ISAIOS XI.

² DEM. XLIII and XLIV.

³ HERMANN-THALHEIM, *Rechtalterthümer*, p. 113.

Archon, made upon entering office for the year.¹ He gave out that every one would be entitled during his archonship to hold all land and movable property which he held when the Archon entered office, and should remain in possession up to the end of his term of office. It might be argued that this constitutes protection, and would form the ground for an action if the proclamation were infringed. But this idea can hardly stand when we consider the existing evidence; there is no speech on such a theme, and although the argument *a silentio* is not always a very sound one, it is pretty strong in this case, because so many forensic speeches have survived, and we are informed as to the general contents of many lost orations. The truth probably is that the proclamation was an archaic survival from the time when the First Archon was really a very important magistrate, a kind of President of the Republic. The proclamation has great historical significance, but it is not the foundation of any process in law. It was meant to guarantee the rule of law in connexion with every right of property as well as of possession.

Yet in a community so highly developed as the Athenian State protection against dispossession by violence had to be provided in some way, and we do find certain forms of procedure intended to meet the need. The principal remedy was the *δίκη ἐξούλης*, employed against those who ousted other people from their possessions. The name was derived, according to Harpokration, from the verb *ἐξίλλειν* meaning "to push out."² This is so clear that the only doubt as to the bearing of the action arose from additional remarks of Harpokration on various cases when it was applied. These remarks have been interpreted to mean that the action was directed towards the execution of a judgement. But these cases mentioned by Harpokration concern particular applications, and the fundamental idea remains the defence of possession.³

¹ *Ath. Const.* c. 56 ὅσα τις εἶχεν πρὶν αὐτὸν εἰσελθεῖν εἰς τὴν ἀρχήν, ταῦτ' ἔχειν καὶ κρατεῖν μέχρι ἀρχῆς τέλους.

² HARPOKR. *δίκη ἐξούλης* (LIPSIUS, 665); see below, p. 225.

³ As to the other statements contained in Harpokration's fragment see the controversy between RABEL and LIPSIUS in *Z. SS. Roman. Abth.* 1915 to 1918.

Instances of the process are found in several speeches of the Attic Orators; Demosthenes used it in a trial arising from his suit against his guardian Aphobos. The latter had been convicted of mismanaging Demosthenes' property during his minority, and was condemned to pay both fine and compensation; but when Demosthenes tried to get the money, a certain Onetor came forward saying that that part of Aphobos' property was pledged as the dowry of his wife. Demosthenes had the right to remove this obstruction by means of the *δίκη ἐξούλης*.¹

A second process, *δίκη βιαιῶν*, applies to dispossession by violence as regards chattels.

We now turn to the question of the protection of public rights and interests. This was secured in two ways: through individual and through State action. Public wrongs.

1. The private accusation, which under the name of *συκοφαντία* became the scourge of Greek public life, was based on the principle that every citizen was called upon to defend and enforce public rights by actions which involved personal profit. The point of view that there is a fundamental difference between public and private, or between criminal and civil law is modern; while recognizing the distinction, the Greeks admitted it only in an attenuated form. An illustration is provided by the typical case of Demosthenes' prosecution of Meidias.² The quarrel was a personal one; Meidias tried to humiliate Demosthenes in every possible way, and even took advantage of the fact that Demosthenes had undertaken a State service as Choragos—he was providing the chorus and appurtenances for a dramatic performance—to insult him publicly. The crown and vestments worn by Demosthenes in his official capacity were torn and cast in the dirt: Meidias actually slapped his enemy in the face.

In bringing his action against Meidias Demosthenes had ample material for enlarging on the personal aspect of the case and the insult to himself, but he went further than this, insisting that in his person as Choragos, the Commonwealth had been insulted. In his speech he brought out

¹ DEM. XXX.

² DEM. XXI.

the point of view that when a man's action includes violence, the effect is public; "what a man does with violence constitutes an injustice against the community."¹ Aristotle in the *Rhetoric* remarks on the contrast between an action for assault (*αἰκίας*), a private wrong, and an action for military desertion (*ἀστρατείας, λιποταξίας*), which entirely concerns the *κοινόν*; "he who commits adultery or assault infringes the rights of a single citizen, but he who fails to perform military duties breaks the law and commits injustice against the commonwealth."² Greek law presented in this way what seems to us a peculiar mixture of civil and criminal procedure.

2. There were also cases in which it was considered that the public offence was so grievous or the public danger so great that the city itself came forward and acted, as it were, personally against the offender. Such a process was called *εἰσαγγελία*, to which a corresponding process is presented under the English system by the Bill of Attainder. This was a political trial in the Council or in the Assembly. The proceedings against the unfortunate commanders who had fought at Arginusae were conducted by *εἰσαγγελία*. Right through the fifth century the Council wielded extensive powers, and was not obliged to wait for the lengthy procedure involved in actions before the Assembly. We read in the *Athenian Constitution* that it was possible and usual for the Council to arrest, imprison, and even put to death people accused of what we should call high treason;³ Aristotle describes with approval the action of one Archinos, who persuaded the Council to inflict punishment without trial on persons who had broken one of the principal conventions for the return of exiles after the downfall of the Thirty.⁴ A resolution of the people,

¹ DEM. XXI, c. 45 πάνθ', ὅσα τις βιαζόμενος πράττει, κοῖν' ἀδικήματα καὶ κατὰ τῶν ἕξω τοῦ πράγματος ὄντων ἡγεῖθ' ὁ νομοθέτης.

² AR. *Rhet.* I, 13, 3 διὸ καὶ τὰδικήματα καὶ τὰ δικαιώματα διχῶς ἔστιν ἀδικεῖν καὶ δικαιοπραγεῖν· ἢ γὰρ πρὸς ἓνα καὶ ὠρισμένον ἢ πρὸς τὸ κοινόν· ὁ γὰρ μοιχείων καὶ τύπτων ἀδικεῖ τινα τῶν ὠρισμένων, ὁ δὲ μὴ στρατευόμενος τὸ κοινόν. Cf. COPE'S *Commentary*, Vol. I, p. 248.

³ *Ath. Const.* c. 45 ἢ δὲ βουλή πρότερον μὲν ἦν κυρία καὶ χρήμασι ζημιῶσαι καὶ δῆσαι καὶ ἀποκτείνειν.

⁴ *Ibid.* c. 40 δοκεῖ . . . πολιτεύσασθαι καλῶς Ἀρχίνος . . . ἐπεὶ τις ἤρξατο τῶν κατελληλυθότων μνησικακεῖν, ἀπαγαγὼν τοῦτον ἐπὶ τὴν βουλὴν καὶ πείσας ἄκριτον ἀποκτείνειν.

(*ψηφισμα*) which afterwards obtained force of law (*νόμος*), put a stop to this use of power by the Council. One Eumelides prevented the execution of a certain Lysimachos by summary process, and a law was passed that no Athenian citizen could be sentenced to death, imprisonment, or confiscation without a decision of the People.¹ This kind of justice appears as the spontaneous action of the political body.

One more variety of procedure must be mentioned in this connexion, namely, the action called *προβολή*.² This was a form of procedure in which a private accuser brought a case before the Assembly and obtained a prejudicial verdict as to the guilt of the accused, but had to bring the case before the Heliastic tribunal afterwards for regular trial. The Court was not bound by the previous decision, but a general atmosphere unfavourable to the accused was obviously created, and an acquittal became improbable, though not impossible. By a curious inconsistency the accuser was allowed to drop the action if he wished.

These were the principal means for the protection of public safety: they can all be traced in modern law, though in different combinations.

5. *Fairness.*

Aristotle adds one more chapter on a kind of justice ^{Ἐπιείκεια.} which he describes as justice outside legality. This is called *ἐπιείκεια*, in the sense of *fairness*; the English word "equity"—originally an equivalent—having assumed a technical connotation as a branch of English law, does not quite fit for our purpose.

The teaching on this department of justice forms one of the most instructive parts of Greek jurisprudence; it has had a long history and a great influence on modern developments of the theory of law. It is noticeable that the

¹ *Ibid.* c. 45 καὶ Λυσίμαχον αὐτῆς ἀγαγούσης ὡς τὸν δῆμιον καθήμενον ἤδη μέλλοντα ἀποθνήσκειν Εὐμηλίδης . . . ἀφείλετο, οὐ φάσκων δεῖν ἄνευ δικαστηρίου γνώσεως οὐδένα τῶν πολιτῶν ἀποθνήσκειν . . . ὁ δὲ δῆμος . . . νόμον ἔθετο, ἂν τις ἀδικεῖν ἢ βουλὴ καταγνῶ ἢ ζημιώσῃ, τὰς καταγνώσεις καὶ τὰς ἐπιζημιώσεις εἰσάγειν τοὺς θεσμοθέτας εἰς τὸ δικαστήριον, καὶ ὅ τι ἂν οἱ δικασταὶ ψηφίσωνται, τοῦτο κύριον εἶναι. Cf. P. CLOCHÉ, *Revue des études grecques*, XXXIII.

² See below, Chap. IX.

framers of the Code Napoléon in 1804 thought it necessary to restate the doctrine of Aristotle on ἐπιείκεια in their introductory chapter. The best and shortest way of approaching the subject is to start with Plato's dialogue called the *Statesman*, in which we read: "The law, in aiming at what is best or most just, cannot at once enjoin what is best for all. The differences of men and actions, and the endless irregular movements of things, do not admit of any universal and simple rule. No art whatsoever can lay down a rule which will last for ever."¹ Compare with this short statement the definition given by Aristotle in the *Ethics*: "The nature of the equitable is the correction of law, inasmuch as law falls short of what is required by the universal terms in which it is expressed. This (deficiency) is the reason why all things cannot be regulated by law, so that decrees are required; that which does not admit of definition must be governed by indefinite rules."² Thus laws are general rules, and for this reason they sometimes fail to do justice to the circumstances of particular cases. There is often a wide gap between the abstract rule and the concrete case, embedded, as it were, in circumstances; it would lead to great injustice if we applied such a rule indiscriminately in all instances. In order to get something more than "book" righteousness, we must admit the force of conceptions which go beyond the rule. Ἐπιείκεια is the liberal application of rules to special sets of circumstances; it forms a link between the general νόμος and the single case in its complicated surroundings.

Treatment
in the
Rhetoric.

In the *Rhetoric*³ Aristotle's treatment is more developed than in the *Ethics*; he says: "The equitable seems to be just, and equity (fairness) is a kind of justice, but goes

¹ PLATO, *Politikos*, 294 a νόμος οὐκ ἂν ποτε δύναίτο τό τε ἄριστον καὶ τὸ δικαιοτάτον ἀκριβῶς πᾶσιν ἅμα περιλαβῶν τὸ βέλτιστον ἐπιτάττειν· αἱ γὰρ ἀνομοιότητες τῶν τε ἀνθρώπων καὶ τῶν πράξεων καὶ τὸ μηδέποτε μηδὲν ὡς ἔπος εἰπεῖν ἡσυχίαν ἄγειν τῶν ἀνθρωπίνων οὐδὲν ἑῶσιν ἀπλοῦν ἐν οὐδενὶ περι ἀπάντων καὶ ἐπὶ πάντα τὸν χρόνον ἀποφαίνεσθαι τέχνην οὐδ' ἡτιοῦν.

² AR., *Eth. Nik.* V, 10, 3, 1137 b τὸ ἐπιεικὲς δίκαιον μὲν ἐστίν, οὐ τὸ κατὰ νόμον δέ, ἀλλ' ἐπανόρθωμα νομίμου δίκαιου . . . καὶ ἔστιν αὕτη ἡ φύσις ἢ τοῦ ἐπιεικοῦς, ἐπανόρθωμα νόμου, ἢ ἑλλείπει διὰ τὸ καθόλου. τοῦτο γὰρ αἴτιον καὶ τοῦ μὴ πάντα κατὰ νόμον εἶναι, ὅτι περὶ ἐνίων ἀδύνατον θέσθαι νόμον, ὥστε ψηφίσματος δεῖ. τοῦ γὰρ ἀρίστου ἀρίστος καὶ ὁ κανὼν ἐστίν.

³ I, 13, 13-18. See appendix to this chapter, p. 71. Cf. JEBB, *Translation of Aristotle's Rhetoric*.

beyond the written law. This margin is left by legislators, sometimes voluntarily, sometimes involuntarily; involuntarily when the point escapes their notice, voluntarily when they are unable to frame a definition, and yet it is necessary to lay down an absolute rule; also in cases which inexperience makes it hard to define,—such as the case of wounding with iron of a given size and kind; for life would not be long enough for a person who tried to enumerate the cases. If, then, it is impossible to be definite, yet necessary to legislate, one must speak generally; and so, if even the wearer of a ring lift his hand against another or strike him, he is guilty of a wrong under the written law, but not in reality; and here fairness comes in.”

The treatment of all the cases which may arise cannot be completely planned beforehand; as Aristotle says, it would take an age merely to enumerate the possibilities; so the general rules must be supplemented by the use of reason and fairness in the application of them.¹

In spite of various drawbacks in their procedure, the Athenians had a great reputation among the Greeks for this very side of their administration of justice; they were admired for their humanity (*φιλανθρωπία*) and fairness (*ἐπιείκεια*).

To illustrate the philosophical treatment of *ἐπιείκεια* by Aristotle let us turn to a few examples drawn from actual litigation. But first let us observe one fundamental limitation; in all these cases we have to deal with *pleadings* in the Courts. Now the essence of forensic pleading is to make one's own case as strong as possible, and to minimize as far as one can the arguments of one's opponent; in no system of law can pleaders be expected to be impartial. In Greek law, so far as it is concerned with the application of *ἐπιείκεια*, the subjective element is very prominent; artificial devices and legal fencing are strongly represented in the speeches of the orators. Wyse, in his very valuable edition of the Speeches of Isaios, has been brought by his close study of his author to an altogether sceptical conclu-

¹ AR., *Rhet.* I, xiii, 13 ff., ed. COPE, pp. 255 ff. Cf. *Pol.* III, 1282 b 2; *Magn. Mor.* II, 1.

sion. He detects so many sophisms and flaws in statement and argument that his final estimate is an absolutely negative one. To this extreme view we may, however, find an antidote in the commentary on the text; for Wyse sometimes attempts to show that both sides are equally wrong, and their arguments equally fallacious, thus leading up to a *reductio ad absurdum* of his main position.

Let us be content with the fact that the general considerations presented by the pleaders usually had public opinion behind them; no audience would stand pure nonsense, and, least of all, a critical Athenian audience. The orators employ every kind of ingenious artifice, but it is to be remembered that they are seeking to persuade a large number of average citizens that certain legal rules had to be applied in a certain way; the Courts *were* influenced by those subjective considerations, which sounded plausible, and appealed to public opinion.

Testa-
ments.

In two departments of law the orators made particularly great use of general considerations of fairness as against exact and rigid legal rules: Testaments and Contracts afforded an extensive field for the application of equitable principles, and many speeches deal with these subjects. That of Isaios on the estate of Nikostratos, though otherwise not very interesting, contains a general remark of great weight.¹ He says that in trials concerning inheritance it is much more important to give heed to circumstantial evidence than to statements of witnesses; because the principal witnesses are generally either dead, or—if the will has been made abroad—absent, and therefore not amenable to cross-examination; their depositions have to be taken as they stand, and strict standards of criticism cannot be applied.

In these testamentary cases there were two facts before the Court; (1) under Solon's law every childless citizen had the free right to make a will, but (2) his will was

¹ ISAIOS, IV, § 12 ἐν μόναϊς δὲ ταῖς τῶν κλήρων εἰσαγωγαῖς δοκεῖ μοι προσήκειν τεκμηρίοις μᾶλλον ἢ μάρτυσιν πιστεύειν. περὶ μὲν γὰρ τῶν ἄλλων συμβολαίων οὐ πάνυ χαλεπὸν τοὺς τὰ ψευδῆ μαρτυροῦντας ἐλέγχειν. ζῶντος γὰρ καὶ παρόντος τοῦ πράξαντος καταμαρτυροῦσι· περὶ δὲ τῶν διαθηκῶν πῶς ἂν τις γνοίῃ τοὺς μὴ ἀληθῆ λέγοντας, εἰ μὴ πάνυ μεγάλα τὰ διαφέροντα εἴη, αὐτοῦ μὲν καθ' οὐ μαρτυροῦσι τεθνεώτος.

invalidated if made in extreme old age, or when the testator was of unsound mind, or under the influence of a woman.¹ Thus, if the actual will had been made in due form, and under normal conditions as to age and mental sanity, the only way to get it set aside was to prove undue influence. Several instances of this occur in the speeches. In Isaios' speech on the estate of Kleonymos the case is somewhat different. The facts were that Kleonymos had quarrelled with his nearest relations, and in a fit of temper had excluded them from his will, and devised his whole estate to strangers. Subsequently, however, as Isaios tries to show, he became reconciled with his relations, and there were some circumstances indicating that at the time of his death he was actually on the best of terms with them. During his last illness he sent for his will with the intention of altering it in favour of his kinsmen; but it did not arrive in time, and the alteration was not made. Isaios pleads that there was sufficient evidence that when he made the will he was not in a normal state of mind, since later on, upon calmer consideration, he came to regret his hasty action, and wished to change the dispositions of his will in favour of his own kin.² The pleadings are based entirely on psychological surmises; the case would be quite impossible to maintain at the present day. There is no doubt, however, that an Athenian Court would frequently listen to such considerations, nor are they entirely foreign to modern practice. Even now, for example, jurymen may sometimes extend leniency to an accused person, not only on account of mitigating circumstances, but also because they are satisfied that he acted under abnormal conditions. Aristotle in the *Problemata*³ says expressly that the efforts of sophists and sharp practitioners were largely directed towards invalidating wills; they persuaded the Courts to attach weight to this kind of psychological suggestions (cf. *ἐνθυμήματα*).

¹ Cf. *HYPEREIDES*, III (V), § 17.

² *Is.* I, e. g. §§ 10-21.

³ *Problemata*, 29, 3, 950 b 5 Διὰ τί ἐνίοις δικαστηρίοις τοῖς γένεσι μᾶλλον ἢ ταῖς διαθήκαις ψηφιοῦνται; ἢ ὅτι γένους μὲν οὐκ ἔστι καταψεύσασθαι, ἀλλὰ τὸν δὲ ἀποφαίνειν διαθήκας δὲ πολλὰ ψευδεῖς ἤδη ἐξηλέγχθησαν οὐσαι.

Contracts. As regards contracts there is a very wide opposition between legal rules and the arguments of pleaders. Hypereides calls attention to the contrast between the letter and the spirit of justice. A certain Athenogenes had persuaded Hypereides' client to buy a shop; he had induced a clever woman of more than doubtful character to serve as his agent in the matter. Under her influence the plaintiff had concluded the bargain. Later on he found that he had been grossly imposed upon, and wanted to rescind the sale. He does not deny that the contract was actually made, but he urges that he was gulled by the blandishments of the lady. This would serve for an argument even now, if fraudulent misrepresentation could be proved, but our present standard is much stricter. Hypereides put the point in a most emphatic way. He forestalled the argument of his opponent, saying: "Athenogenes will tell you that, according to law, agreements made between parties are valid. Yes, if they are in accordance with justice; but when they are not, the law on the contrary forbids them to stand."¹

Interpre-
tation of
archaic
laws.

It is clear that the administration of law in Athens demanded wide discretion on the part of the Courts. In the first place, we are often told that the old laws—especially those of Solon, which in the fourth century were still recognized as the foundation of existing law—were archaic and obscure. But the clumsiness and difficulty of the legislative process made it hard to introduce amendments in good time; consequently they mostly retained their archaic form, and the best course open for amendment was to use wide discretion in interpreting and applying them. This is expressed in the oath taken by the Heliasts, in which they say that if there is a law covering the case, they will obey it, but if the application be doubtful they will judge "to the best of their belief" (*γνώμη δικαιοσύνη*).² It is evident from the speeches that the range of "considerations of justice" was very extensive, and was not really restricted to cases where there were no laws.

¹ HYPEREIDES, *op. cit.* § 13 ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης ὡς ὁ νόμος λέγει, ὅσα ἂν ἑτέρος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι. τὰ γε δίκαια . . . τὰ δὲ μὴ τοῦναντίον ἀπαγορεύει μὴ κύρια εἶναι. Cf. AR., *Rhet.* I, xv. 9.

² POLLUX, VIII, 10 ὁ δ' ὄρκος ἦν τῶν δικαστῶν περὶ μὲν ὧν νόμοι εἰσὶ, ψηφιεῖσθαι κατὰ τοὺς νόμους, περὶ δὲ ὧν μὴ εἰσὶ, γνώμη τῇ δικαιοσύνη. Cf. Cope's *Rhetoric*, I, p. 271.

Another reason for such a free treatment of the laws lies in the fact that the higher Courts (the Heliastic *δικαστήρια*) represented the Sovereign People. Therefore orators sometimes addressed juries as "you citizens of Athens." Thus the use of discretionary power by the Courts constitutes an appeal to what is termed *residuary justice*. There must be, as we see even in our own law, a margin beyond actual legality. "Grace" is nowadays a political prerogative concerned with cases of commutation of criminal sentences; but in the fourteenth century, for instance, the residuary justice vested in the King was a very serious element in the juridical system. The King was to some extent the safeguard and guarantor that there should be no gaps and no exaggerations in the administration of justice. He acted, through his Council or through Parliament, especially with regard to cases where no remedy could be found at law. In the Athenian juridical system Demos takes the place of King or Parliament. The Heliæa, though we are inclined to oppose it to the Ekklesia, is really a sovereign assembly of the same kind. The word "Halia," used in Doric Greece for the Assembly of the People, is the same as the "Heliæa" of Athens.

Residuary
justice of
the
people.

In this way the wide scope of the doctrine of *ἐπιείκεια* covered general fairness and humanity; and it is not to be wondered at that it did not form a separate class of legal rights and remedies as did general, corrective, and distributive justice, but transcended these divisions and found expression in practically every department of law. Modern juries act to some extent on similar lines when they are moved by appeals to unwritten law, by psychological suggestions, by pressure of public opinion.

Before leaving the legal system, let us consider briefly two additional passages in Aristotle's *Ethics*, dealing with Retaliation, and Exchange. We read in the fifth book:¹ "There are some who consider retaliation (*τὸ ἀντιπεπονθός*) as justice." The reference is to the Pythagorean conception

Retribution.

¹ *Eth. Nik.*, V, 5, 1132b 21 *δοκέει δέ τισι καὶ τὸ ἀντιπεπονθός εἶναι ἀπλῶς δίκαιον, ὥσπερ οἱ Πυθαγόρειοι ἔφασαν. . . . τὸ δ' ἀντιπεπονθός οὐκ ἐφαρμόττει οὐτ' ἐπὶ τὸ νευμητικὸν δίκαιον οὐτ' ἐπὶ τὸ διορθωτικόν . . . πολλοῦ γὰρ διαφωνεῖ οἷον εἰ ἀρχὴν ἔχων ἐπάταξεν, οὐ δεῖ ἀντιπληγῆναι, καὶ εἰ ἄρχοντα ἐπάταξεν, οὐ πλεγγυῖν μόνον δεῖ ἀλλὰ καὶ κολασθῆναι.*

that the root of justice is in retribution. Aristotle denies this, and criticizes sharply the view, and yet in some respects he accepts it. He says that, while τὸ ἀντιπεπονθός cannot be applied in criminal justice, it may be applied to some measure in civil law. This seems a contradiction, for retaliation does occur in connexion with delict, and this stands on the border between criminal and civil justice. He rejects the Pythagorean view, first because τὸ ἀντιπεπονθός does not fit in with either distributive or corrective justice, and secondly because it is impossible to apply the principle of proportion; "eye for eye and tooth for tooth" cannot be exacted if the persons concerned are differently situated; supposing one were a magistrate and the other an ordinary citizen, or one were a citizen, and the other a slave. In these cases the mere returning of a blow would by no means equalize matters.

Justice in
exchange.

Aristotle does, however, recognize that, as regards exchanges, real justice would lie in the establishment of equivalents, and this idea, though not identical with that of retribution, is analogous to it. He examines the work of various crafts in relation to each other, e.g., the problem of equating boots with houses, a process which can be accomplished by estimating the demand for a commodity in the market¹ or the amount of work put into the product, and the use which is to be made of it.²

The question may be asked, especially in our days of profiteers and soaring prices, whether there is any indication of a policy directed towards the establishment of a "fair price." The treatment of the subject in Plato's *Laws* might lead one to suppose that the Greeks favoured the idea that prices should be regulated, e.g. in regard to land. There is one sentence, and that a very short and obscure one, which could be interpreted in this sense. "If you want to establish proportion, you should not do it when the exchange has been made, but when everybody has got his own."³ This

¹ *Eth. Nik.* V. 5, § 8, 1133 a 8 δει οὖν λαμβάνειν τὸν οἰκοδόμον παρὰ τοῦ σκυτοτόμου τὸ ἐκείνου ἔργον, καὶ αὐτὸν ἐκείνῳ μεταδιδόναι τὸ [τοῦ] αὐτοῦ. εἰάν οὖν πρῶτον ἢ τὸ κατὰ τὴν ἀναλογίαν ἴσον, εἶτα τὸ ἀντιπεπονθός γένηται, ἔσται τὸ λεγόμενον· εἰ δὲ μή, οὐκ ἴσον οὐδὲ συμμενεῖ· οὐθὲν γὰρ κωλύει κρείττον εἶναι τὸ θατέρου ἔργον ἢ τὸ θατέρου· δεῖ οὖν ταῦτα ἰσασθῆναι. . . . δεῖ τοίνυν ὑπερ οἰκοδόμος πρὸς σκυτοτόμον, τοσαυτὰ ὑποδήματα πρὸς οἰκίαν.

² *Magn. Mor.*, IX, 1194 a 2 ff.

³ *Eth. Nik.*, *loc. cit.*, § 12, 1133 b 1 εἰς σχῆμα δ' ἀναλογίας οὐ δεῖ ἄγειν,

seems to indicate the establishment of a maximum or tariff of some kind, which ought to be set up before the exchange takes place.

We have now concluded our survey of the legal system with its three categories, Specific Justice, subdivided into Distributive and Corrective, and General Justice, covering rules as to civil rights and public law; all these departments were affected by *ἐπιείκεια*, the principle of fairness or equity, which appears to be the most characteristic contribution of Greece to the treatment of legal problems.

APPENDIX TO CHAPTER III

AR. *Rhet.* I. xiii. §§ 13–18. (Cope's text.)

Τὸ γὰρ ἐπιεικὲς δοκεῖ δίκαιον εἶναι, ἔστι δε ἐπιεικὲς τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον. συμβαίνει δὲ τοῦτο τὰ μὲν ἀκόντων τὰ δὲ ἐκόντων τῶν νομοθετῶν, ἀκόντων μὲν ὅταν λάθῃ, ἐκόντων δ' ὅταν μὴ δύνωνται διορίσαι, ἀλλ' ἀναγκαῖον μὲν ἢ καθόλου εἰπεῖν, μὴ ἢ δέ, ἀλλ' ὡς ἐπὶ τὸ πολὺ. καὶ ὅσα μὴ ῥάδιον διορίσαι δι' ἀπειρίαν, οἷον τὸ τρῶσαι σιδήρῳ πηλίκῳ καὶ ποιῶ τινί. ὑπολείπει γὰρ ἂν ὁ αἰὼν διαριθμοῦνται. ἂν οὖν ἢ ἀδιόριστον, δέη δὲ νομοθετῆσαι, ἀνάγκη ἀπλῶς εἰπεῖν, ὥστε κἂν δακτύλιον ἔχων ἐπάρηται τὴν χεῖρα ἢ πατάξῃ, κατὰ μὲν τὸν γεγραμμένον νόμον ἔνοχος ἔστι καὶ ἀδικεῖ, κατὰ δὲ τὸ ἀληθὲς οὐκ ἀδικεῖ, καὶ τὸ ἐπιεικὲς τοῦτο ἐστίν. . . . ἐφ' οἷς τε γὰρ δεῖ συγγνώμην ἔχειν, ἐπιεικῆ ταῦτα, καὶ τὸ τὰ ἀμαρτήματα καὶ τὰ ἀδικήματα μὴ τοῦ ἴσου ἀξιοῦν, μηδὲ δὲ ἀμαρτήματα καὶ τὰ ἀτυχήματα· ἔστι δ' ἀτυχήματα μὲν ὅσα παράλογα καὶ μὴ ἀπὸ μοχθηρίας, ἀμαρτήματα δὲ ὅσα μὴ παράλογα καὶ μὴ ἀπὸ πονηρίας, ἀδικήματα δὲ ὅσα μήτε παράλογα ἀπὸ πονηρίας τ' ἐστίν· τὰ γὰρ δι' ἐπιθυμίαν ἀπὸ πονηρίας. καὶ τὸ τοῖς ἀνθρώποις συγγνώσκων ἐπιεικὲς. καὶ τὸ μὴ πρὸς τὸν νόμον ἀλλὰ πρὸς τὸν νομοθέτην σκοπεῖν, καὶ μὴ πρὸς τὸν λόγον ἀλλὰ πρὸς τὴν διάνοιαν τοῦ νομοθέτου, καὶ μὴ πρὸς τὴν πράξιν ἀλλὰ πρὸς τὴν προαίρεσιν, καὶ μὴ πρὸς τὸ μέρος ἀλλὰ πρὸς τὸ ὅλον, μηδὲ ποῖός τις νῦν, ἀλλὰ ποῖός τις ἦν αἰεὶ ἢ ὡς ἐπὶ τὸ πολὺ. . . . καὶ τὸ ἀνέχεσθαι ἀδικούμενον. καὶ τὸ μᾶλλον λόγῳ ἐθέλειν κρίνεσθαι ἢ ἔργῳ. καὶ τὸ εἰς δίκαιον μᾶλλον ἢ εἰς δίκην βούλεσθαι ἰέναι· ὁ γὰρ δαιτητῆς τὸ ἐπιεικὲς ὄρα, ὁ δὲ δικαστῆς τὸν νόμον· καὶ τούτου ἕνεκα δαιτητῆς εὐρέθη, ὅπως τὸ ἐπιεικὲς ἰσχύῃ.

ὅταν ἀλλάξωνται (εἰ δὲ μή, ἀμφοτέρας ἔξει τὰς ὑπεροχὰς τὸ ἕτερον ἄκρον), ἀλλ' ὅταν ἔχωσι τὰ αὐτῶν.

CHAPTER IV
THE SOURCES OF LAW

1. *Enactments.*

The term
"source."

IN proceeding to consider the subject of sources of Greek law, we must be careful not to confuse historical with juridical sources; the former term refers to material for information, while the latter deals with authority. Of course, testimony in words and in writing is employed in order to argue a case and to prepare a decision; in this sense information assumes a specially juridical aspect, and gives rise to the law of evidence. Evidence deals, however, with facts and not with law, though its use is regulated by law. What we mean by source of law is the authority from which law is derived.

Νόμος.

Now what were these sources for Greek law? At present we recognize: (1) Statutory law, enacted by Parliament or under the authority of Parliament by subordinate bodies such as County Councils, Borough Councils, etc.; (2) Common law, a body of rules abstracted from decisions given in particular cases: it may be therefore designated judge-made law; (3) Custom, rules of law arising out of the traditional local practice, apart from direct enactment or authoritative decision of the Courts. In Greece the relation between these categories differed from that obtaining nowadays. In the period covering the greater part of the fifth and the beginning of the fourth centuries Greek democracies, as represented by Athens, required that laws should be enacted. This principle usually holds good for that period, though it is not absolutely applicable even then; still, at that time *νόμοι* undoubtedly were the principal source of law. In the speech made by Andokides in his defence against the charge of having taken part in the profanation of the Eleusinian Mysteries, the strongest argument is that the sentence of *ἀτιμία*, defamatory dis-

franchisement, passed on him, had been abrogated by the amnesty declared in the archonship of Eukleides¹; mention is also made of a great revision of the laws made in 403 B. C.,² in consequence of an enactment by the people, on the reconstruction of the constitution, to the effect that (1) no unwritten law should have force, which means, apparently, that nothing but the written laws were to be regarded as binding; (2) that no decree of the Assembly or of the Council should overrule a law; (3) that no law should be enacted in regard to single individuals (ἐπ' ἀνδρῶν); (4) written laws were declared to be those received and confirmed at the revision under Eukleides.³

These rules, enumerated by Andokides, are very characteristic; if applied in their full force they would amount to absolute abrogation of customary law and to the recognition of statute law as the one source of legal authority. Such a principle is suggested by democratic doctrine; the People were the only legislative factor, and therefore every kind of law should have come expressly from the People. Custom was looked upon with disfavour, because it had its roots in antiquity, when privileged groups or families held sway. Such a view certainly prevailed in Athens, as may be gathered, for instance, from a passage in Euripides' *Suppliants*.⁴ In this play suppliants come to seek the protection of the Athenians against the Tyrant of Thebes, Kreon, whose heralds pursue them. The King of Athens, Theseus, in spite of the anachronism, appears as the spokesman of democracy and opposes the heralds. He expresses the view of law held by every right-minded citizen. "Nothing

¹ ANDOKIDES, I, 73-80.

² *Ibid.* 81 ff.

³ *Ibid.* 89 . . . ἔδοξεν ὑμῖν δοκιμάσαι μὲν τοὺς νόμους, δοκιμάσαντες δὲ ἀναγράψαι, ἀγράψω δὲ νόμῳ τὰς ἀρχὰς μὴ χρῆσθαι μηδὲ περὶ ἐνός, ψήφισμα δὲ (μηδὲν) μήτε βουλῆς μήτε δήμου (νόμου) κυριώτερον εἶναι, μηδ' ἐπ' ἀνδρῶν νόμον (ἐξείναι) τιθέναι εἰν μὴ τὸν αὐτὸν ἐπὶ πᾶσιν Ἀθηναίους, τοῖς δὲ νόμοις τοῖς κειμένους χρῆσθαι ἀπ' Εὐκλείδου ἀρχοντος . . . Cf. DEM. XXIV, § 42.

⁴ *Op. cit.* 429 ff. :

οὐδὲν τυράννου δυσμενέστερον πόλει,
 ὅπου τὸ μὲν πρῶτιστον οὐκ εἰσὶν νόμοι
 κοινοί, κρατεῖ δ' εἰς τὸν νόμον κεκτημένος
 αὐτὸς παρ' αὐτῶ· καὶ τόδ' οὐκέτ' ἔστ' ἴσον.
 γεγραμμένων δὲ τῶν νόμων ὃ τ' ἀσθενῆς
 ὁ πλουσίος τε τὴν δίκην ἴσην ἔχει.

is more deadly to a commonwealth than a tyranny, for then, to begin with, there are no common laws, but the single ruler himself holds sway over the law; this is not equitable. But when laws are written down, then both rich and poor can claim equal justice." Such a written law is νόμος; it is a measure carried through and promulgated according to the regular process of legislation.

Another term to be considered is θεσμός, which was properly applied to a declaration of customary law; the words "statement" or "establishment" would almost exactly render its meaning. It is not necessarily an act of the people as a whole, but rather of a college of magistrates or of a single lawgiver, declaring the law to the people. Thus Drakon is usually described as a θεσμοθέτης, Solon as a νομοθέτης¹; but Solon himself uses both terms with no perceptible difference of meaning.²

Laws and
decrees.

Let me revert again to the democratic principle that enacted law is the normal source of legal authority.

In his classification of democracies in the *Politics* Aristotle lays stress on the difference between constitutions and governments which follow strictly the legal rules of the Commonwealth, and those which, on the contrary, disregard these rules, and govern more or less according to the whims and fashions of the Demos. While explaining the contrast, he emphasizes the fact that in the first class law (νόμος) holds the chief place, while in the second it is the decree (ψήφισμα) which takes precedence of enacted law.³ "This is a state of affairs brought about by the demagogues. For in democracies which are subject to law the best citizens are chosen as rulers, and there are no demagogues; but where the laws are not supreme, demagogues spring up. The people becomes practically a monarch. . . . And the people, which is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and becomes a despot; the flatterer is held in honour; this sort of democracy being relatively to other democracies what tyranny is to other forms of monarchy.

¹ Cf. ANDOKIDES, I, § 81 χρῆσθαι τοῖς Σόλωνος νόμοις καὶ τοῖς Δράκοντος θεσμοῖς.

² Cf. however below, p. 129.

³ AR., *Pol.* VI (IV), 4, 1292 a, 7 ff.

The spirit of both is the same, and they exercise alike a despotic rule over the better citizens. The decrees of the Demos correspond to the edicts of the tyrant. . . . The demagogues make the decrees of the people override the laws, and refer all things to the popular assembly."

This theme is treated with many variations; Aristotle returns to it continually. It forms an important basis of his classification from the point of view of legality. For example, in Athens he notices systematic endeavours to keep up law-abiding democracy, as against the outbursts of passion and arbitrary rule towards the end of the Peloponnesian war, and in the course of the fourth century. Public law was maintained, on the whole, on the lines indicated by Aristotle, the central idea being that νόμος, enacted law, has to be guaranteed and fenced round by carefully-devised measures of a public character.

2. Custom.

Was the democratic ideal of a State governed by enacted law ever in force? Is it true that custom and juridical authority were not active as legal sources during the classical period? Even if there were no direct testimony to the contrary, it would be hard to believe that customary law did not exist, and in fact some evidence is available showing that there was a vast amount of customary and business rules in existence by the side of enacted law, and that Athens, in particular, was governed to a large extent by traditional law.

Interpreters of custom.

In regard to sacral institutions, and in all cases where religion was concerned, the influence of traditional usage asserted itself emphatically. The Council of the Areiopagos had jurisdiction in cases of homicide, arson, and similar offences, and this body was guided in its decisions by custom not put down in writing, and not enacted by the people, but preserved by traditional jurisprudence as τὰ πάτρια, ancestral custom. There were professional representatives of legal lore from whom the ordinary Athenian had to seek instruction. These were termed ἐξηγηταί (interpreters), who, according to the lexicographers, were able to give authoritative interpretation of traditional law;

inscriptions record three kinds of interpreters: (1) *ἐξηγηταὶ Πυθόχρηστοι*, (2) *ἐξηγηταὶ τῶν Εὐμολπιδῶν*, (3) *ἐξηγηταὶ τῶν Εὐπατριδῶν*. The first title contains a reference to the oracle at Delphi, and the officials in question evidently dealt with legal customs assumed to have been derived from Delphi. In cases of purification, for example, when a stain or pollution had to be removed from a family, or from the people as a whole, the *Πυθόχρηστοι* probably prescribed the measures to be taken. The second kind were a consultative board for matters connected with the Eleusinian Mysteries, the family of the Eumolpidae being the most influential of the clans concerned with the celebration of these Mysteries. As to the third kind, our knowledge is less definite; not all the Eupatrid families are meant, but a special group of juriconsults.¹

As to the process of consultation, a speech of Demosthenes against Euergos and Mnesibulos² gives graphic information. This case arose out of an execution for debt. A former trierarch (i. e. one responsible for fitting out a ship) had not rendered satisfactory account of some material supplied to him by the State; he was called to account and sentenced, and his goods were to be confiscated in payment. One Theophemos was empowered to carry out the execution, and in doing so treated the household of the debtor with great harshness; an old woman—an emancipated slave who had been all her life in the family—was so roughly handled that she died. The question arose, who had the right to prosecute in connexion with her death? If she had been a *relative* of the family, Drakon's rules would have been applied; they declared who among the kindred should be the accuser, and who should support him; but as the dead woman had not been a relative, but only a member of the household, the matter was uncertain. The plaintiff in the case explains that, being in doubt, he went to the Interpreters, and asked for their advice.³

¹ *R.-Enc. s. v. ἐξηγηταί.*

² DEM., XLVII. Euergos and Mnesibulos were accused of having given false witness in the suit between Theophemos and the present plaintiff.

³ DEM., *op. cit.*, §§ 68, 69 ἀκούσαντες δέ μου οἱ ἐξηγηταὶ ταῦτα, ἤροντό με πότερον ἐξηγήσωναί μοι μόνον ἢ καὶ συμβουλευέωσιν. ἀποκριναμένον δέ

“When they heard the facts they asked me whether I wanted them merely to interpret, or also to tell me what would be expedient in the matter.” Thus it is clear that they did not only expound legal custom, τὰ νόμιμα, but also gave advice to those who consulted them, that is, their function was that of *juris periti*, specially versed in a certain branch of law. When we reflect on the vital importance of religion and ritual in Greek public life, we obtain some idea of the influence of the ἐξηγηταί.

There is another connexion in which traditional law was still of great importance; there can be no possible doubt that the chief forms of procedure—the different kinds of δίκαι and γραφαί—had been settled long before the period of Ephialtes and Perikles, that is, before the middle of the fifth century. We know, for instance, that the First Archon had a wide jurisdiction in family affairs; that cases of wrongs to parents, orphans, heirs, and minors under guardianship, all of which constantly occurred from early times, were within his competence.¹ The only innovation carried out by Ephialtes in this respect consisted in widening the range of appeal to the Heliastic Courts. These Courts were a Solonian institution, but in the sixth century, before the life of Attika became centralized in the metropolis, the difficulty and cost of coming into the city from the country districts materially limited the scope of appeal (ἔφεσις) to the Heliæa, and these Courts cannot have sat often. The necessity for the introduction of μισθοφορία towards the middle of the fifth century shows that before that time the jurors could be called up only on rare occasions. Again, for jurisdiction in the country districts, Peisistratos was the first to institute δικάσται κατὰ δήμους, who were not Heliasts, but substitutes for the Archon.

Rules laid down by magistrates.

In the city the Archon's jurisdiction was the chief means of securing justice; he sat originally as ἀυτοκράτωρ, and the appeal to the Heliæa was reserved for the most important cases. In fact, most of the judicial life of Athens before

μον αὐτοῖς ἀμφότερα, εἶπόν μοι “ ἡμεῖς τοίνυν σοι τὰ μὲν νόμιμα ἐξηγησόμεθα, τὰ δὲ σύμφορα παραινέσομεν.”

¹ AR., *Ath. Const.* 56.

the second quarter of the fifth century was conducted by the magistrates, and not by the Heliaea. It was not until the League gave the Athenians hegemony in a great part of Greece that these Courts acquired the importance attributed to them, for example, in the *Wasps* of Aristophanes, and we have to be on our guard against a possible distortion of juridical perspective arising from too exclusive attention to this period of their history.

Many of the forms of action handed down from earlier times were not regulated by enacted law, but had been evolved by practice; these forms were elaborated gradually, starting, in some cases, from times before Drakon and Solon, and were in general use in the sixth century. Thus the law of procedure remained chiefly traditional, though in some cases there were new laws enacted to regulate it.

3. *Authority of Precedents.*

Pre-
cedents as
examples.

Was there anything in Greek law corresponding to what is called judicial authority? In English law this is a very important source of law, operating with "precedents," which, though not actual law, lend authority to decisions; when a number of decisions on the same point follow one another on the same lines, they crystallize, as it were, into a rule of Common Law.

As far as Athens and other Greek democracies are concerned there is nothing quite similar, because precedents were not formally binding.¹ In Greece a peculiar way of influencing law by authority is apparent in the practice of the Heliaea. A *δικαστήριον* of the Heliaea was unable to refer to what is termed the *ratio decidendi* based on precedent, but when decisions followed each other in the same sense, direction was given to professional opinion and cases came to be decided not under direct precedent, but on the ground of similarity of motive and of prevailing conditions.

An instance in point may be cited from Demosthenes' speech against Dionysodoros. The case arose out of a loan

¹ It should be noted that even in English law the hierarchy of authorities culminating in the House of Lords only became binding in the course of the nineteenth century. In the United States Common Law exists apart from a general hierarchy of decisions.

made by certain merchants resident in Athens (*μέτοικοι*) to the skipper of a ship sailing to Egypt to buy corn. The loan was made on condition that the skipper should return to Athens with the corn and sell it there, because it was expected that the corn would realize a large profit in the Athenian market, and the calculations of interest, etc., were made on this basis. But the ship, instead of bringing the corn to Athens, went from Egypt to Rhodos, and, the corn having been sold there, came home without a cargo. The skipper was prosecuted for breach of contract; he pleaded *vis major* (a storm) in excuse, but this was held to be insufficient, as the corn had been sold in Rhodos contrary to agreement. At the end of the plaintiff's speech occurs the following appeal to the Court¹: "Do not disregard the fact that now, while you are deciding a single case, you are legislating for the whole of the market, and that numbers of those whose business is by sea are standing here awaiting your decision. If you maintain the validity of these contracts and agreements, and show no mercy to those who break them, the money-lenders will be more ready to make advances, and your trade will be stimulated." Thus the decision of a Court could be regarded as a symptom of the views held by the tribunals.

On a number of points the decisions of the Heliaea produced changes of the law. This might occur in cases where there had originally been a definite *νόμος*, which, however, had not been applied for a long time; if then a case came up for decision under conditions non-existent at the time when the law was made, the Court might treat it as if it were not binding. As regards wills, there was considerable freedom in the use and application of ancient rules. The cumulative effect of such free application was that a foundation was laid for a remedy which in Roman law took definite shape in the *querela inofficiosi testamenti*—a tendency prompted by the fact that there was a general distrust of, and disinclination to grant probate in the case of wills in which the claims of near relatives were disregarded. In Roman law eventually this produced a custom of the Courts to treat wills as void in which one-fourth of

Influence of Heliastic decisions on law.

¹ DEM., LVI, § 48, p. 1297.

the property had not been left to near relatives. The same feeling is shown in Greek law in the attacks made on wills by relatives whose claims have been ignored by the testator.¹

In some cases claims are urged that are not acknowledged by formal law, but creep in by the help of Heliastic decisions; for example, inheritance by the mother. The mother was not an heiress at law in the fourth century, while in the second she occupies a place in succession: in the same way in Roman law she eventually obtained a standing in the table of statutory succession. For this point in Greek law we have evidence in the speech of Isaios about the estate of Hagnias,² a case of *διαδικασία*. In this trial the mother of one of the parties was admitted to present a claim, and she obtained some votes. It was the Archon who admitted her, and his action in doing so shows that he recognized a powerful tendency of public opinion in this direction.

Again, as regards bequests, a similar tendency is at work. Bequests were valid if the heir consented to them, and had to be paid through him; this made it very difficult to leave anything to outsiders, and the law of the fourth century shows a bent in favour of legatees, while in the next century an actual change in the law takes place.³ This change was not brought about by legislation (*νομοθεσία*), but by the enlargement of the application of the law in the Courts. Similarly in the case of dowry, though it was not legally required, it became in practice a test of the legitimacy of marriage.⁴ These instances may serve as examples of a judge-made method for completing, supplementing, and correcting the law.

¹ E. g. ISAIOS, I, §§ 33, 34, 35, ending: *ὥστε τις ἂν ὑμῶν ταύτας εἶναι κυρίας τὰς διαθήκας ψηφίσαιτο, ἃς ὁ μὲν διαθέμενος ὡς οὐκ ὀρθῶς ἐχούσας ἀπεδοκίμασεν.*

² ISAIOS, XI, § 2 *εἰν δὲ καὶ τοῦτ' ἐκλίπη τὸ γένος, . . . ποιῆ τοὺς πρὸς μητρὸς τοῦ τελευτήσαντος κυρίου αὐτῶν.* § 17. *εἰς τοσαύτας δ' ἀπορίας κατέστησαν ὅ τι ἀντιγράφονται περὶ τῆς ἀγχιστείας, ὥστε . . . ῥαδίως ὑπ' ἐμοῦ τότε ἐξηλέγχθησαν . . . οἱ δ' ὑπὲρ τῆς Ἀγνίου μητρὸς . . . νόμῳ ἀποκληρομένης ὃς κελεύει κρατεῖν τοὺς ἄρρενας, τοῦτο μὲν εἶσαν, οἰόμενοι δ' ἐμοῦ πλεονεκῆσειν μητέρα εἶναι τοῦ τελευτήσαντος ἔγραψαν' ὃ συγγενέστατον μὲν ἦν φύσει πάντων, ἐν δὲ ταῖς ἀγχιστείαις ὁμολογουμένως οὐκ ἔστιν.*

³ BEAUCHET, *Droit privé*, III, 697 ff.; WYSE, *op. cit.*, 325.

⁴ ISAIOS, III, § 28.

4. *Voluntary Jurisdiction.*

It is often forgotten by those who are not brought into contact with the legal profession that actual law is often based on things never promulgated as formal rules, but elaborated by business practice. The latter is not the same thing as custom; it represents not traditional views as to justice, but the cumulative effect of voluntary agreements. This phase is very fully illustrated in Greek law; we have evidence, especially for the later period, from inscriptions and papyri. An example may be taken from an inscription which belongs to the beginning of the second century B.C. It refers to a loan made by a banker named Alexandros to the town of Arkesine in the island of Amorgos. The terms are set forth, and one sentence runs as follows:¹ "If the citizens do not pay the interest, the execution shall be double, falling on private property by every means, just as if there had been a conviction in a trial for ejection before a tribunal of arbitrators." Thus the whole trial, which should lead to the issue of a writ of execution, becomes unnecessary, and a stage in its development is omitted, for the sake of summary execution. Instead of going to a Court and getting an order for arrest or execution, the injured party can proceed by the method of self-help on the basis of the agreement made. This is possible because the other party has voluntarily submitted to the terms of the contract. In French law there is an equivalent process called *Exécution parée*. This way of claiming money is shown by inscriptions to have been quite common in Greek law.²

A further point to be noted is that in Greek legal practice a contract could be made in writing, and the writing of it established and guaranteed the details.³

If we ask who it was that made these agreements valid

¹ *I. J. G.*, I, xv, B, § 3, p. 318 εἰς τὸν τόκον μὴ ἀποδώσιν, πρακτοὶ ἔστων Ἀλεξάνδρῳ οἱ μὴ ἀποδόντες διπλάσιον τὸ ἀργύριον ἐκ τῶν ἰδίων πράξει πάσῃ καθάπερ δίκην ὠφληκότες ἐξούλης ἐν τῇ ἐκκλήτῳ καὶ ὄντες ὑπερήμεροι . . .

² See also DEMOSTHENES, XXXV. The speech is a claim for the repayment of a loan; the case arises out of an ἐμπορικὸν συμβόλαιον.

³ See below, Chap. XI.

and authorized the tribunals to give verdicts with regard to them, we can only say that the practice was the result of voluntary action on the part of contracting parties. The law was based on constantly recurring business arrangements, and on the fact that the Courts accepted the documents as conclusive evidence.

In the *Digest* the law on shipwreck or jettison is traced to the law of Rhodos, that is, the maritime customs made in the third and second centuries B.C. By that time Athens had lost her supremacy, and Rhodos was the commercial centre of the Eastern Mediterranean. For the earlier practice we can refer, among other things, to the speeches of Demosthenes against Lakritos and against Zenothemis. Customs originating in agreements between skippers, merchants, bankers, and crews gathered force, and were supported by the tribunals.

Scribes.

Let us note in conclusion the influence of a professional class of scribes (*γραμματεῖς*) corresponding to our clerks and solicitors. The direct bearing of their practice on the law is not hard to see; they were armed with technical knowledge and skill, which made their assistance indispensable to the less instructed citizens, although the latter were politically the masters. The influence of the scribe, it may be added, was of far greater importance in the East than in the West.

It may be said without paradox that the most influential scribes belonged to the lower personnel of the profession. There was a number of high-standing secretaries who were elected by lot in fourth-century Athens from among citizens. Five of these officials are mentioned in the list of the Council of 335 B.C.; the *γραμματεὺς κατὰ πρυτανείαν*, the *γραμματεὺς τῆς βουλῆς*, the *ἀναγραφεὺς*, the *γραμματεὺς ἐπὶ τὰ ψηφίσματα*, and the *ἀντιγραφεὺς*. Aristotle, in the fifty-fourth chapter of the *Athenian Constitution*, gives a somewhat different enumeration, but in substance his account does not contradict the evidence of inscriptions. Now the fact that these officials, as well as the *γραμματεὺς τῶν θεσμοθετῶν*, are all chosen by lot, shows that no importance was attached to their learning. On the contrary, their numerous subordinates for the keeping of accounts, drawing up re-

ports, formulating and publishing decisions and decrees, were required to possess knowledge and experience. One of the most prominent Athenian orators, Aischines, had made his way to a great extent thanks to his training as a clerk.¹ Even the standing of a State slave did not debar men from acquiring important positions as specialists in this line. Most of the Athenian accountants seem to have been *δημόσιοι*, i. e. slaves. In the most ancient reference to the status of a *γραμματεὺς*—an inscription of Olympia of the year 580 B.C.—if we are to trust Blass's interpretation—a certain Patrias is granted protection as to his person, family, and property, although of foreign descent, because of his employment as a scribe.² Altogether, the most definite evidence concerning the importance of skilled clerks comes from minor cities. The inscriptions of Priene are especially instructive in this respect. A certain Hegopolis, for instance, was sent as secretary to a citizen of Priene who had to act as an umpire in deciding a case between foreign cities, and the same man has to accompany another embassy of three representatives of Priene on a similar errand.³ Perhaps the most interesting example is that of a certain Apellis, son of Nikophon, who asks to be relieved from the office of a *γραμματεὺς*, in which he had served for twenty years; out of these twenty years, for fourteen he performed his duties without pay, and had even taken charge of other clerkships, thus saving the city from considerable expenses.⁴

¹ DEMOSTHENES, XVIII, § 127.

² *Gr. Dial. Inscr.* I, 320, No. 1152.

³ MICHEL, 468 (pp. 346 f.).

I . . . ἵνα ἡ βουλὴ καὶ ὁ δῆμος βουλευέσθαι τίσιν δεῖ τιμαῖς τιμηθῆναι τὸν δῆμον τὸν Πριηνέων καὶ τὸν παραγερόμενον πρὸς ἡμᾶς δικαστὴν . . . καὶ τὸν γραμματέα Ἡγέπολιν Ἡγίου . . . ἐπαινεῖσαι δὲ καὶ τὸν συνεξαποσταλέντα μετ' αὐτοῦ γραμματέα Ἡγέπολιν Ἡγίου . . . καὶ στεφανώσαι τὸν μὲν δικαστὴν χρυσῶι στεφάνωι . . . τὸν δὲ γραμματέα θαλλοῦ στεφάνωι. II . . . καὶ ἐστεφανώκασι . . . τὸν γραμματέα θαλλοῦ στεφάνωι.

and 543 (pp. 407 f.) . . . ἐπρηῆσθαι δὲ καὶ τὸν ἀποσταλέντα αὐτοῖς γραμματέα Ἡγέπολιν Ἡγίου καὶ στεφανωθῆναι ἐν τοῖς Ἀντιοχείοις ἐλαίαις στεφάνωι.

⁴ HILLER VON GAERTRINGEN, *Inscriften von Priene*, 4, p. 7 ἐπειδὴ Ἀπελλίς Νικοφῶντος γραμματεὺς αἰρεθεὶς ὑπὸ τοῦ δήμου ἔν τε ταῖς δίκαις καὶ ἐν τῇ τῶν κοινῶν γραμμάτων πίστει καὶ κυριεῖαι καὶ ἐν τοῖς ἄλλοις τοῖς κατὰ τὴν πόλιν πρᾶσσόμενοις ἅπασιν ἴσως καὶ δικαίως τὴν χρεῖαν παρέσχηται τῶν πολιτῶν ἐκάστωι, καὶ περὶ τοὺς κοινούς τῆς πόλεως ἀγῶνας χρήσιμος καὶ πρόθυμος ὧν διατετέλεκεμ περὶ πλείστου ποιούμενος τὸ τὰ δίκαια φαίνεσθαι πράττων, νυνὶ δὲ παρελθὼν εἰς τὴν ἐκκλησίαν ἐμπεφάνικεν, ὅτι τὰ μὲν πάντα ἔτη πεπραγμέυται εἴκοσιν, τούτων δὲ δεκατέτταρα ἔτη τὴν

The cumulative effect of the ant-like work of the innumerable clerks and accountants on the formation of technical rules can hardly be overestimated.

NOTE

I should like to make a few remarks as to a curious and doubtful case reported by Andokides in the speech on the Mysteries. It bears on the trial of his father Leogoras, who, during the famous process about the destruction of the Hermae, had been denounced by a slave as having participated in the sacrilege, and had been included in the proposal of a certain Speusippos, a councillor (*βουλευών*) among the persons charged of the crime.¹ Leogoras had thereupon brought against Speusippos a *γραφὴ παρανόμων*, as to the contents of which Andokides does not give explicit information. But he states that this *γραφὴ* was discussed before a tribunal of 6,000, and that Speusippos succeeded in collecting only a couple of hundred votes. The problem is: What kind of Court could this assembly of 6,000 have been? The number of persons seems to indicate the Assembly (*ἐκκλησία*), but the terms of the reference speak definitely of a sitting of judges (*δικασταί*), and the case was treated on the lines of a *γραφὴ παρανόμων*, that is, as a legal and not as a political trial. It seems² that the speaker deals with a case assimilated to the passing of a decree *ἐπ' ἀνδρί*, of which proscription by ostracism presents the most conspicuous instance. It is certainly remarkable that Andokides speaks of *δικασταί*; this means that the *ἐκκλησία* was considered a *δικαστήριον* when performing judicial duties.³

τοῖς στρατηγοῖς γραμματεῖαν ληλητούργηκε δωρεάν καὶ τοῦ ἀναλώματος τοῦ γνομένου ἐκ τῶν νόμων τῶι τῶν νομοφυλάκῳ καὶ τιμούχῳ γραμματεῖ παραλέλυκε τὸν δῆμον . . .

δεδοχθαι . . . παραελύσθαι τε Ἐπελλιν τῆς γραμματείας καθότι ἤξιωκεν καὶ ἐπαινεῖν αὐτόν, κτλ. Cf. DITT. *Syll.*³ I. 353. On the whole subject see SCHULTHESS in *R.-Enc.* VII, s.v. *γραμματεῖς*.

¹ ANDOK. I, 17 Σπεύσιππος δὲ βουλευὼν παραδίδωσιν αὐτοὺς τῷ δικαστηρίῳ. κἄπειτα ὁ πατὴρ . . . ἐγράψατο τὸν Σπεύσιππον παρανόμων, καὶ ἠγωνίσασατο ἐν ἑξακισχιλίοις Ἀθηναίων, καὶ μετέλαβε δικαστῶν τοσοῦτων οὐδὲ διακοσίας ψήφους ὁ Σπεύσιππος.

² Cf. FRAENKEL, *Die attischen Geschworenengerichte*, pp. 89 ff.

³ The Assembly is treated as a *δικαστήριον* in AISCHINES, I, 86 *συνδεκάζειν τὴν ἐκκλησίαν καὶ τὰ ἄλλα δικαστήρια*.

CHAPTER V

THE STRUCTURE OF THE CITY

1. *The Federation of Kindreds.*

MODERN democracies which have arisen in the course of the struggle against feudalism and absolutism bear a strongly individualistic stamp. In France after the Revolution, for example, all organizations and social groups likely to claim autonomous authority were suppressed as dangerous rivals of the commonwealth. This tendency to isolate the individual is conspicuously absent in the Greek City-state; it was not conceived as an aggregate of individuals, but consisted of clusters of kinsmen, strongly bound together by common interests and common religion. The earlier ages may be characterized as epochs of federation—the federation of kindreds (*γέννη*).

According to the testimony of Aristotle,¹ the ancient social constitution of Athens was based on an arithmetical scheme; four phylae or tribes, each divided into three phratries, each of the latter again divided into thirty kindreds (*γέννη*), and each kindred represented by thirty men (*ἄνδρες*), forming a beehive-like community consisting of ten thousand and eighty units.

Such a scheme seems quite unreal to us—in fact the result of artificial calculation, but it must after all contain an element of reality. The number thirty (*τριακάς*) is actually taken as an equivalent term for the *γένος*; those who were not *γεννήται* were said to be *ἔξω τριακάδος*, “outside the thirty.” Plato, too, in the ideal State described in the *Laws*, estimates the number of householders at exactly five thousand and forty, just half of Aristotle’s total.² Inscript-

¹ This testimony is preserved by the lexicographers, who quote from pages of the *Athenian Constitution* no longer extant.

VALENTIN ROSE, *Aristoteles Pseudepigraphus*, Fr. 385³ (*Ath. Const.* ed. KAIBEL u. WILAMOWITZ-MOELLENDORFF, Fr. 3).

² *Laws*, V, 745.

tions from Samos and Kos refer sometimes to units of an arithmetical scheme. In a decree of 324 B. C., two strangers, Gorgos and Minyon, on receiving permission from Alexander the Great to return to their native town, were granted Samian citizenship; they were to be reckoned as "born Samians," and therefore had to enter some division of the population. They obtain leave to join any tribe, any thousand, any hundred, and any kindred.¹ Thus the schematic arrangement has clearly some foundation in fact requiring explanation.

In the case of Plato's 5,040, it is plain that he had in view the number of κλήροι or *holdings* taken as normal, and this is probably suggested by some historical fact. In saying this I do not affirm, of course, that the scheme was always in being; war, poverty, and death must have caused many inroads on the regularity of the numbers; but, as the policy was directed towards keeping up the kindreds (γένη),² the disruption of the scheme was not so great as one might expect. The system aimed, no doubt, at a certain equilibrium between the tribal elements of the population by assigning to them evenly distributed shares of the territory. We may then assume that, even if the numbers cited are only approximate, ancient Athens was arranged as a federation of kindreds. And this original scheme was never entirely broken up; Kleisthenes did not abolish the kindreds, but restricted the sphere of their religious, punitive, and cultural activity.

The constitution of a phratry after the reform of Kleisthenes is well known³; there were two elements in it: (1) the γένη, provided with pedigrees, cults, and a close organization, the members of which are all full γεννήται or ὀμογάλακτες; (2) besides these there was a large number of "plebeians," if one may use the expression: these also had their religious organization, though not so strict or

¹ DITT. *Syll.* I³. 312, p. 531 καὶ ἐπικληρῶσαι αὐτοὺς ἐπὶ φυλὴν καὶ χιλιαστὴν καὶ ἑκατοστὴν καὶ γένος. The word ἐπικληρῶσαι evidently means no more than "choose." It is noteworthy that the system here is decimal as at Rome, not duodecimal as at Athens.

² Cf. FRANCOU, *La polis grecque*, pp. 22 f.

³ See e. g. SCHOEMANN-LIPSIUS, *Griechische Alterthümer*, II, pp. 574 f.

extensive as that of the *γένη*; they were called *ὀργεῶνες*, and formed groups called *θίασοι*. The latter term is used in two senses; it may denote any religious association of free growth, and in this sense it occurs in a law of Solon;¹ in the second sense it points to a circle formed of men who could not trace their origin to a kindred, but were united by religious rites (*ὄργια*). An interesting decree of the Deme of Peiraieus may serve as an illustration.² It was intended to keep the element of *ὀργεῶνες* within limits. We have no direct information about the internal life of the *γένος*; but we have inscriptions made by phratries which not only describe the arrangements of these bodies but also refer to the *γένη*.

Let us take two such inscriptions, both of the fourth century: one from Chios, set up by the Klytidae, the other from Delphi, set up by the Labyadae. The first³ treats of the construction by the Klytidae of a kind of chapel or shrine for their holy objects, which were previously dispersed in private houses. The first part of the inscription contains the decree forbidding to keep holy objects in a private house; the inscription then proceeds: "The Klytidae have decreed that the sacred house of the Klytidae in which the holy objects are deposited, and the place in front of the house, shall be used by the Klytidae in common, and no kindred (*φατρίαν*?) or private person shall use it. He who uses the house (privately), or allows anybody else to use it, shall pay to the Klytidae a fine of 1,000 drachmae sacred to Zeus Patroos for each case of use or leave to use, and he shall be cursed in accordance with the law." This decree was passed in a regular assembly with the sanction of a heavy fine and with the additional penalty of the curse. It is clear from this fact that the phratry had power to

¹ *Digest*, XLVII, 22, 4. See below, p. 120, Chap. VI.

² *C. I. A.* II, 573 b (p. 421).

³ MICHEL, 997, p. 786 *ἐγνώσαν Κλυτίδαι τῶι ἱερῶι οἴκω τῶν Κλυτιδῶν ἐν ᾧ τὰ πατρῶια ἱερά κάθηται καὶ τῶι χώρῳ τῶι πρὸς τῶι οἴκῳ χρῆσθαι Κλυτίδας κοινῆι, φατρίαν δὲ μηδὲ ιδιώτην μηθένα τῶι οἴκῳ τούτῳ χρῆσθαι μηδὲ ἄλλωι δοῦνα χρῆσασθαι μηθενί. ὅς δ' ἂν παρὰ ταῦτα ἢ αὐτὸς χρῆσεται τῶι οἴκῳ ἢ ἑτέρῳι δῶι χρῆσασθαι, ἀποδότην καθ' ἐκάστην χρῆσιν ἢ δόσιν Κλυτίδαις χιλίας δραχμὰς ἱερὰς τοῦ Διὸς τοῦ Πατρῶιου, καὶ ταῖς ἐκ τῶν νόμων ἀραῖς ἔνοχος ἔστω.*

inflict punishment. It is probable that if a person would not pay the fine an action would lie in the public Courts, and the delinquent would be made to pay, because by taking part in the religious rites of his group he had made himself liable to penalties inflicted by it. The word *φρατρίαν* must evidently be taken here as an equivalent for *πατρίαν*, and not for *φρατρίαν*; as to the reading a fragment of *Dikaiarchos* supplies an appropriate comparison.¹ *Φρατρίαν* is impossible; the sacred house was only to be used by the *φρατρία* as a whole—not by an individual or by a division; the division must be a kindred, that is, a *γένος* or *πατριά*.

The
Labyadae.

The Labyadae inscription gives further information; it is in the Delphic dialect, and contains several unusual words, the meaning of which is, however, not difficult to guess.² "It has been decided by the Labyadae by 182 votes that the *tagoi* shall not receive offerings on the occasion of marriages or births or victims on majority, unless by consent of the kindreds (*γένη*). If they give an order against the law, it shall be done at the peril of those who give the order." In other paragraphs of the decree we find besides the *tagoi* other officials referred to, for example, the *δημιουργός*. A similar prohibition concerns judges who take an oath; the case is parallel to the veto above on the arbitrary taking of offerings. These judges are analogous to the *Heliasts* at Athens, and the formula of their oath contains a prayer to the gods to give them the best of good things if they judge rightly, and to afflict them with misery if they judge wrongly.

Infamy (*ἀτιμία*) and fines could be inflicted by the phratry, but this declaration of *ἀτιμία* is not identical with that pronounced by the commonwealth; it could only mean that the phratry considered the person in question to be deprived of his status in the corporation. The inscription contains also an enactment about funerals; the corpse is not to have

¹ *Fragm. Hist. Graec.* (ed. MULLER), *DICAEARCHI MESS.* 9, p. 238.

² *I. J. G.* II, xxviii, pp. 180-2, § 3 (about 400 B.C.) *ἔδοξε Λαβυάδαις . . . ἐν ταῖς ἀλίσαις σὺν ψά[φ]οις ἑκατὸν ὀγδοήκοντα δυοῖν: Τοὺς ταγοὺς μὴ δέκεσθαι μήτε δαράταν γάμελα μήτε παιδηῖα μήτ' ἀπελαῖα, αἱ μὴ τὰς πατριάς ἐπαινεύσας καὶ πληθύσας, ὡς καὶ ἦν· αἱ δὲ τί καὶ παρ νόμον κελεύσωντι, τῶν κελευσάντων ὁ κίνδυνος ἔστω.*

more than one carpet and one pillow beneath it as it lies on the pyre; it is not to be carried about the streets by people wailing aloud; it must not be deposited at cross-roads on the way to the pyre or burial ground. These sacral regulations were issued by the phratry concurrently with rules made by cities. The decree of the phratry is passed by a large majority.

An inscription from Attika presents another side of the ^{The Demo-} ^{tionidae.} activity of a phratry, namely the relations between members of the corporate body. The most important are those dealing with *διαψηφίσις*, the revision of lists of citizenship. A general revision took place because the phratry had to revise its composition in accordance with a law introduced by Perikles.¹ The usual mode of proof was by reference to the entry of the individual into the phratry at birth or at adolescence (at the Apaturia). The deme and the city generally accepted this evidence. There was, however, a general revision soon after 396 B.C., to which an inscription set up by the Demotionidae refers.² It contains, among other things, the following rules: "Every one of the excluded has leave to appeal to the Demotionidae. In this case the house of Dekeleia shall elect five men of more than thirty years of age as public representatives (*συνήγοροι*), and they shall be made by the phratriarch and the priest to swear an oath that they will decide in accordance with justice, and not allow any one who does not belong to the phratry to be admitted to the phratry. Any appellant rejected by the Demotionidae shall pay a fine of 1,000 drachmae sacred to Zeus Phratrios." The house of Dekeleia is evidently the premier kindred of the phratry, and takes the lead in any case affecting that body. We do not see what the majority of the members of the phratry have to do in the appeal; the case seems rather like that depicted on the shield of Achilles, where a trial is being held in the agora,

¹ PLUTARCH, *Perikles*, c. 37.

² *I. J. G.* II, xxix, pp. 200 ff., § 3 *ἐὰν δὲ τις βόληται ἐφείναι ἐς Δημοσιωνίδας ὧν ἂν ἀποψηφίσωνται, ἐξείναι αὐτῶν· ἐλίσθαι δὲ ἐπ' αὐτοῖς συνήγορος τὸν Δεκελειῶν οἶκον πέντε ἄνδρας ὑπὲρ τριάκοντα ἔτη γεγονότας, τόπος δὲ ἐξορκωσάτω ὁ φρατριάρχης καὶ ὁ ἱερεὺς. συνηγορήσεν τὰ δικαιοτάτα καὶ ὁκ εἶσεν ὀδένα μὴ ὄντα φράτερα φρατρίζεν. ὅτο δ' ἂν τῶν ἐφέντων ἀποψηφίσωνται Δημοσιωνίδαι, ὀφειλέτω χιλίας δραχμὰς ἱερὰς τῶι Διὶ τῶι Φρατρίωι. (396-350 B. C. ?)*

and the people take sides, though the chiefs of the *γένη*, or *βασιλείς*, decide the case, giving their decisions in turn. Similarly here the decision is entrusted to five *συνήγοροι* under oath before the whole phratry. A second fragment¹ of the decree refers to the procedure in an extraordinary *διαδικασία*. "When the revision (*διαδικασία*) takes place, the phratriarch shall not let the members of the phratry vote as to the children until the members of the *thiasos* of each candidate have given their votes by secret ballot, and these votes are counted and declared by the phratriarch in the presence of all the members of the phratry present in the meeting (*ἀγορά*)." *ἀγορά*.)"

Prosecu-
tion by
kinsmen.

Other evidence is supplied by the Drakonian law for manslaughter of 621 B. C., which was re-enacted in 409 B. C. after the collapse of the Four Hundred. In cases of manslaughter (when a man kills another *μη ἐκ προνοίας*)² the slayer has to flee; the accusation must be brought by relatives of the deceased, relationship being reckoned in circles. The first circle comprises the members of the household. The relatives of this first circle have the duty of prosecuting the slayer. "The proclamation against the slayer shall be made in the market-place by the relatives nearer in degree than cousins. Cousins and sons of cousins, fathers-in-law, brothers-in-law and members of the phratry shall join in the prosecution."³ With the same relatives rests the right to compromise—to let off the slayer. If these near relatives are not forthcoming, the right to prosecute falls to the phratry; there is no mention of the *γένος*; it is the *ἀγχιστεία*, that is, the near relatives and representatives of the phratry, who are to avenge. The absence of the *γένος* looks like the result of a change made in the course of a revision of the law; in any case, in spite of the omission,

¹ *I. J. G.* II, xxix, p. 204, § 9 "Ὅταν δε ἦι ἡ διαδικασία, ὁ φρατρίαρχος μὴ πρότερον διδῶτω τὴν ψήφον περὶ τῶν παίδων τοῖς ἀπασιν φράτερσι πρὶν ἂν οἱ αὐτοὶ τοῦ εἰσαγομένου θιασῶται κρίβδην ἀπὸ τοῦ βωμοῦ φέροντες τὴν ψήφον διαψηφίσωνται, καὶ τὰς ψήφους τὰς τότεων ἐναντίον τῶν ἀπάντων φρατέρων τῶν παρόντων ἐν τῇ ἀγορᾷ ὁ φρατρίαρχος διαριθμησάτω καὶ ἀναγορευέτω ὅπως ἂν ψηφίσωνται.

² See below, Chap. IX, section 2.

³ *I. J. G.* II, xxi, p. 2, § 4 προειπέν δὲ τῷ κτέναντι ἐν ἀγορᾷ ἐντὸς ἀνεφισιόετος καὶ ἀνεφισιό· συνδιόκεν δὲ καὶ ἀνεφισιός καὶ ἀνεφισιόν παῖδας καὶ γαμβρὸς καὶ πενθερὸς καὶ φράτερας.

the line of *agnatic* relationship is kept up. In the order of succession cognates are admitted after the agnates, but in the order of avengers the agnatic group of the phratry follows immediately on the narrower *ἀγχιστεία*.

2. *The Household.*

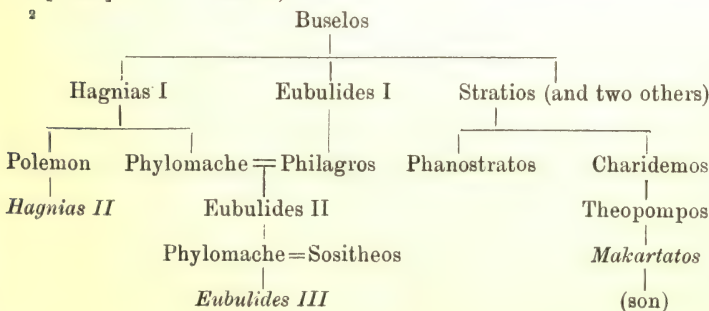
If the scheme of federation of kindreds could have been upheld systematically, the *κλῆρος* and the *οἶκος* would have been two aspects of the same institution—*holdings* in the sphere of property would have corresponded to *families* in the sphere of kinship. But owing to the development of industrial and commercial conditions this correspondence had to be abandoned. At Athens, in spite of certain efforts made to maintain the holding, property in land was mobilized. Yet the principle that family property should be the basis of a citizen's status was preserved, as may be seen from the practice of Athenian law in the fourth century.

The case of the estate of Hagnias.

Let us take as an example the case dealt with in the speeches of Demosthenes against Makartatos, and of Isaios on the other side in defence of Makartatos' claim.¹ The matter in dispute was the inheritance of one Hagnias; both parties based their claim on relationship to the deceased, but Demosthenes claimed that his client Eubulides was the only person who could really inherit on grounds of kinship, the others being outside the limit of the household (*οἶκος*). Demosthenes, at the beginning of his speech, explains the situation as regards the family. This is as follows:² *Ἀγχιστεία* and *οἶκος*. Buselos had five sons, each of whom married and had children and grandchildren, five families (*οἴκοι*) being thus

¹ [DEM.] XLIII. ISAIOS, XI.

²



formed. Two of these sons have no connexion with the case; the other three were Hagnias I, Eubulides I, and Stratios. Hagnias had two children, Polemon and Phylomache, Polemon had a son *Hagnias II*, who died childless, and whose inheritance (*κληρος*) is now in dispute. Phylomache, full sister to Polemon, was married to Philagros, the son of Eubulides I, and therefore cousin to Polemon (*ἀνεψιός*). Their son is Eubulides II, whose daughter gave birth to *Eubulides III*, on whose behalf the claim to the estate of Hagnias is being made by his father Sositheos, the client of Demosthenes. Meantime Stratios, the third son of Buselos, had a family consisting of two sons, Phanostratos and Charidemos, of whom Charidemos had a son Theopompos, whose son *Makartatos* is the other claimant to the estate (*κληρος*) of Hagnias. Sositheos, in the speech written for him by Demosthenes, rests the claim of Eubulides III on the fact that the family (*οἶκος*) of Hagnias was represented at the time only by Eubulides III, whose grandfather was Hagnias' first cousin through Phylomache, and whose great-grandfather was first cousin to Polemon, the father of Hagnias. He maintained that Theopompos and Makartatos were quite outside the family (*οἶκος*), and could have no claim, Theopompos being only second cousin to Hagnias. Makartatos, or Isaios on his behalf, disputes Eubulides' claim on the ground that Phylomache (the elder) was not full sister to Polemon, and traces his claim from Stratios as the brother of Hagnias' grandfather—Charidemos, grandfather of Makartatos, being first cousin to Polemon, father of Hagnias, just as much as Philagros was. That is, they go back a generation farther and establish their claim as descendants of a common great-grandfather, and not of a grandfather.

Thus the view that the *οἶκος* only included those descended from one (common) grandfather (in this case the elder Hagnias) was disputed, but it could not be contested that the estate of Buselos had been divided among his five sons. If it had remained undivided, the case might have been considered differently. Anyhow, the discussion of the question as to the *οἶκος* must be separated from that of the *ἀνεψιότης*.

It would not do to restrict the issue to the question whether the expression *μέχρι ἀνεψιαδῶν* means "up to first cousins once removed"—as contended by Demosthenes—or, "up to second cousins"—as argued by Isaios. At first sight the right seems clearly to be on the side of the first interpretation, but it is impossible to go past the fact that in the previous trial a *δικαστήριον* had decided the case in favour of Theopompos, the father of Makartatos, and therefore had pronounced in favour of the interpretation of Isaios. It would be too cheap an expedient to class this decision among the blunders of a democratic tribunal misled by crafty pleaders. The truth probably was that the Athenians were wavering between two conceptions of the *ἀγχιστεία*, a wider and a more narrow one. Theopompos succeeded on the strength of the latter. On the other hand, when the trial was resumed by Demosthenes on behalf of Sositheos against Theopompos' son, the new pleader sought to strengthen his client's argument by introducing the notion of the *οἶκος*, as there could be no doubt that the unity of the household did not go higher up than the *οἶκος* of Hagnias.

The case helps to establish a point in the law of property descending by pedigree; the estate (*κλήρος*) should remain compact, and could continue so for many generations, and the efforts of kindred were directed to this end, whoever the heir-at-law really was.

Nevertheless, property was much broken up, in spite of devices such as the marriage of the heiress (*ἐπίκληρος*) to the nearest agnate. On the religious and moral side, the notion of maintaining the family unity was more lasting; e.g. it was strongly felt that the family graves should be kept up by the elder line.

These points about kindred help to show how the Athenians drew the line between citizens and other classes of the population. The system of family holdings reacted on law, and courts had constantly to deal with the *οἶκος* and the phratry.

The result was the enforcement of stringent rules as to purity of descent. These were not mere devices of individual statesmen to prevent overcrowding by aliens; the

Restrictions as to citizenship.

law regarding citizenship was connected with the main principle of kinship, and was restored after any disturbance, in order to keep up the principle of political privilege. The laws against intrusion were very severe; at the time of Kleisthenes many slaves and strangers had found their way into the privileged circle,¹ but under Perikles citizenship was again restricted to those whose parents on both sides were of Athenian birth.² Again, after the re-establishment of the democracy in 403 B. C., in the archonship of Eukleides, the law as to descent from citizens on both sides was re-enacted. Towards the middle of the fourth century, in 364 B. C., a third enactment of the same kind was made. The procedure and the penalties in connexion with it show how much importance was attached to keeping up the barrier. The demes as well as the families contributed to this end. An illustration is given in the speech of Demosthenes against Eubulides;³ as a result of the process of scrutiny (*διαψήφισις*) in the deme of Halimus, one Euxitheos had been deprived of citizenship; he took advantage of the fact that he could appeal to the Courts, and accused the demarch of unfair practices in carrying out the *διαψήφισις*. He maintained that nearly every one had gone away before the voting, and that, in spite of his request for an adjournment, the demarch forced a vote, giving out more voting stones than there were persons present. He admitted that his family had become impoverished, but he pointed out that this was no legal ground for disfranchisement. The fact that the penalty for failure in such an appeal from the decision of the deme to the popular Courts was the sale of the appellant into slavery shows what importance was attributed to the matter.

¹ See below, Chap. VI, p. 117.

² See above, p. 55.

³ DEM. LVII, 3; cf. LIX, esp. § 13 *ἐγὼ τοῦτον ἦκω ἐπιδείξων εἰς ὑμᾶς, ξένη μὲν γυναικὶ συνοικοῦντα παρὰ τὸν νόμον, ἀλλοτρίους δὲ παῖδας εἰσαγαγόντα εἰς τε τοὺς φράτερας καὶ εἰς τοὺς δημότας, ἐγγυῶντα δὲ τὰς τῶν ἑταιρῶν θυγατέρας ὡς αὐτοῦ οὖσας, ἡσεβηκίτα δ' εἰς τοὺς θεοὺς, ἄκρουρον δὲ ποιοῦντα τὸν δῆμον τῶν αὐτοῦ, ἂν τινα βούληται πολίτην ποιήσασθαι· τίς γὰρ ἂν ἔτι παρὰ τοῦ δήμου ζητήσῃε λαβεῖν δωρεῖάν, μετὰ πολλῶν ἀναλωμάτων καὶ πραγματείας πολίτης μέλλων ἔσσεσθαι, ἐξὸν παρὰ Στεφάνου ἀπ' ἐλάττωτος ἀναλώματος, εἰ γε τὸ αὐτὸ τοῦτο γενήσεται αὐτῷ;*

We know, too, from the *Athenian Constitution*,¹ that a scrutiny (*δοκιμασία*) as to the same point was obligatory in the case of candidates for the archonship. Thus barriers were set up against the intrusion of outsiders, and the democracy of Athens when considered from a legal point of view was a democracy by pedigree.

Citizenship in Greece was regarded in a different way from that which developed later in the Roman Empire. It was a political as well as a civil complex of rights; the fact that a citizen was a potential ruler, and had actual access in his turn to political power hampered the development of forms of incomplete citizenship. Such an incomplete form, similar to what the Romans called *civitas sine suffragio*, existed, but arose in a peculiar way and in exceptional circumstances. In the fifth century those who did not possess full rights were not regarded as citizens at all. Usually when privileges were granted to benefactors of the city they did not amount to citizenship. This is the meaning of *προξενία*—the granting of rights to favoured treatment as a specially protected visitor: quite a different position from citizenship. In a case recorded by an inscription² full citizenship was granted by way of exception: Thrasybulos of Kalydon, in consideration of his having slain Phrynichos, one of the Four Hundred (in 411 B. C.) was given full rights, and was admitted to the federation of families, being allowed to select as his own any tribe, deme, and phratry that he pleased. That is, he obtained not only public and political rights, but also private family rights: it was indeed a case of naturalization.

A lower class of the population of Athens clearly distinguishable from the foregoing are the denizens (*μέτοικοι*), resident aliens not protected by any special decree, or by any treaty between Athens and their own city. They live on sufferance, are exploited by the State in taxation, and liable to military service of a subordinate kind, such as rowing in the fleet; we hear that some who had served in this capacity at Arginusae were rewarded by promotion to

¹ Chap. 55.

² *DITT. Syll.* I³. 108, p. 139.

citizenship. Their situation is one of economic dependence and legal sufferance. They were kept strictly outside the circle of active citizenship, and any attempt on their part to get within that circle was punished by heavy penalties. The unfavourable treatment of that class in fully-developed democracies may be connected with the general view of Greek political thinkers that handicraft and retail trade were inferior occupations, and unworthy of free citizens.¹

3. *The City and Religion.*

Psycho-
logical
unity of
the City.

No State has existed or can exist as an artificial and mechanical arrangement; behind the constitution, the magistrates, and the laws there always is a substratum of group psychology, a conscious and subconscious unity, not in itself political or juridical, but necessary for the vitality of the political and juridical structure. That is why the term "organic" is used in speaking of States; they are organized for common life and action, while nations are social groups in which union is supposed to be derived from common origin and breeding, as is shown by the very word. It is immaterial whether the community of race can be proved as a physical fact, or whether the term is extended to cover an admixture of elements transformed and assimilated by civil intercourse. It may seem doubtful whether the word "nation" may apply to such small and simple States as were the Dorians of Sparta or of Argos, offshoots of one ethnographical stock. But it seems appropriate to use it also in their case, because each of those cities always felt as a community of related people, very exclusive with regard to outsiders.

As a result of this psychological fact, the law of Greece cannot be understood unless we take stock of City-religion. For in the religious domain the psychological substratum

¹ Cf. e.g. AR. *Pol.* IV (VII), 9, 1329a 20 τὸ γὰρ βάνανσον οὐ μετέχει τῆς πόλεως, οὐδ' ἄλλο οὐδὲν γένος ὃ μὴ τῆς ἀρετῆς δημιουργόν ἐστιν. 1328 b 37 φανερόν . . . ὡς ἐν τῇ κάλλιστα πολιτευομένη πόλει καὶ τῇ κεκτημένη δικαίους ἄνδρας ἀπλῶς, ἀλλὰ μὴ πρὸς τὴν ὑπόθεσιν, οὔτε βάνανσον βίον οὔτ' ἀγοραῖον δεῖ ζῆν τοὺς πολίτας (ἀγεννῆς γὰρ ὁ τοιοῦτος βίος καὶ πρὸς ἀρετὴν ὑπεναντίος), οὐδὲ δὴ γεωργοὺς εἶναι τοὺς μέλλοντας ἔσσεσθαι (δεῖ γὰρ σχολῆς καὶ πρὸς τὴν γένεσιν τῆς ἀρετῆς καὶ πρὸς τὰς πράξεις τὰς πολιτικὰς). See, however, ZIMMERN, *Greek Commonwealth*, pp. 270 f., and GLOTZ, *Le travail en Grèce*, pp. 193 ff.

became personified. It is impossible to speak of the connexion, still less of the separation, of Church and State, because there was no differentiation of the two; the City *was* a religious as well as a political community. The Greek commonwealths present themselves to our view as households of the gods. Athens is the house of Athene, Eleusis of Demeter Samos of Hera, Ephesos of Artemis, &c. In the Athenian tradition Athene Polias appears as the actual mistress of Athens, with her dwelling-place beside that of Erechtheus, the "Ἡρως of the soil.¹ In illustration of this we read² that when Kleomenes occupied the Akropolis as an ally of Isagoras, and wanted to enter the temple of Athene, he was met by the priestess with the words: "Stranger from Lakedaimon, retire; enter not the temple; for it is not lawful that Dorians should pass therein."

The struggles between the cities were in a way struggles for the supremacy of one or the other cult. In many instances it was sought to weaken the political feeling of a community by abolishing or modifying its cults. Thus Kleisthenes of Sikyon got rid of the cult of Argive Adrastos, substituting for him another Hero, from Thebes, Melanippos, who had defeated Adrastos in war.³ Dionysos probably obtained participation in the patronage of the Apaturia in connexion with a similar reform made by Kleisthenes of Athens.

Cults provided centres of political grouping. It would be a mistake to treat the matter in a rationalistic way. In Aristotle's *Politics*⁴ we have an interesting discussion about the juridical nature of the State; he says that in one sense the State was a continuous growth in which the elements changed, but unity remained, in the same manner as in a stream the water is always changing, while the river remains one and the same. In a similar way it is possible to conceive the State as a historical unit in which change of form does not produce an essential difference of substance.

¹ HOMER, *Odyssey*, VII, 78 ff. 'Αθήνη . . . λίπε . . . Σχερίην ἐρατεινήν, ἵκετο δ' ἐς Μαραθῶνα καὶ εὐρύγαυαν Ἀθήνην, δύνε δ' Ἐρεχθῆος πυκινὸν δόμον.

² HEROD. V, 72.

³ *Ibid.* 67.

⁴ *Pol.* III, 3, 6, 1276 b. See below, p. 105.

From another point of view, however, any profound change in "the constitution" starts a new era. Aristotle does not decide between these two views, though he seems to incline towards the second, and to hold that the State is comprised within the *πολιτεία*. In early Greece this problem could not arise, because the unity expressed in the cult was the accepted symbol and factor of union, and this idea persisted to some extent even in later times. If it be asked whether the Greeks conceived the State as a corporation, the reply should be, I think, that they did not think of a corporation in the modern sense of the word, but of a community whose life was connected with the immortal person of the god—Athens, for example, was as it were held in trust by Athene. Thus we have to deal in City-religion not only with a theological and psychological, but also with a juridical conception.

Religious
obligations
of
citizens.

The fact of belonging to such a community imposed religious duties on the citizen. The order of procedure in public affairs shows the close connexion with religion; in the *πρυτανεῖον*, τὰ ἱερὰ καὶ ὄσια have precedence over all other business.¹ The religious aspect of citizenship may be illustrated from Plato's *Euthyphron*, where the discussion turns on the meaning of religious obligation.² The belief in the gods of the city and the coincidence of religion and justice, it was argued by Plato in defence of Sokrates, do not go so far as Anytos and Meletos claimed. Yet from the general notion of justice as regards the gods, i.e. the duty of serving them in a particular way, there follow certain consequences. The importance attached to the oath of allegiance to the State is insisted upon, e.g. in Lykurgos' speech against Leokrates; in accusing him of deserting the city in her hour of need, Lykurgos refers to that oath: "The bond of democracy is the oath. The city is constituted of three elements—the magistrate, the judge, and the private citizen. Each one of these three tenders his fealty by right. . . . The oath-breaker cannot conceal himself from the gods, nor can he escape their punishment. If it

¹ SCHOEMANN-LIPSIUS, I. 414.

² *Op. cit. Euthyphr.* 12 d εἰ γὰρ μέρος τὸ ὄσιον τοῦ δικαίου, δεῖ δὴ ἡμᾶς, ὡς ἔοικεν, ἐξευρεῖν τὸ ποῖον μέρος ἂν εἴη τοῦ δικαίου τὸ ὄσιον.

is not he himself who succumbs to great misfortunes, then it is his children and the whole of his kindred.”¹

In dealing with the most important matters—legislation, judgement, conferment of privilege, even the enlightened democracy of the fifth and fourth centuries made a distinction between what was settled in the Assembly by an ordinary vote, and what was done under oath. Thus, in the case of *νομοθεσία* it was found necessary to entrust the most important part of the legislative function to sworn judicial commissioners. In correspondence with the public importance of the oaths taken by archons and dikasts, tending as it did to the establishment of confidence in political affairs, stands the fact that every Athenian when admitted to citizenship as an “ephebos” swore on oath to honour and worship the gods of the city.² Every now and then situations occurred in the history of Athens in which waves of religious reaction against frivolity in matters of religion rose high. Such was, for instance, the outbreak against Alkibiades and his companions in connexion with the mutilation of the Hermae.³

Scholars disagree as regards prosecutions for breach ^{ἄσέβεια.} of the law as to religious duties. Some authorities, e.g. Schömann, hold that the Athenians never tried to impose a definite code of doctrine, and only insisted on outward respect and compliance with certain requirements of public ritual. Participation in the great festivals, e.g. the Panathenaic, was a duty prescribed by law; no one could refuse to take the part assigned to him. Even metoics had their place in the procession, and only slaves were *not* admitted to any festival except the Kronia, a Greek parallel to the Roman Saturnalia.⁴ The highest expression of this participation was the public service (*λειτουργίαι*), the provision of choruses, and of religious embassies.

But it cannot be denied that the Athenians did now and then prosecute people for subversive teaching in matters

¹ LYK. in *Leokr.*, 79.

² SCHOEMANN-LIPSIUS, 379.

³ THUK. VI, 60. Cf. I, 126.

⁴ DAR. et S. s.v. *kronia*.

of religion. There was no special department of State to deal with religious thought, but every citizen had the right to bring an accusation of impiety against a neighbour. On some occasions special decrees were passed, e.g. that of Diopieithes, which served as a basis for the prosecution of Sokrates.¹ This case is the most familiar instance, but it is not the only one; Anaxagoras was condemned for teaching that the sun was a glowing mass of stone and not a deity.² One Hygiainon, in the course of a case of *ἀντιδοσις*, accused Euripides of impiety on account of a line in his *Hippolytos* (612): "My tongue it was that swore, my heart is free."³

Thus the way was always open for accusation on the score of an offence against religion, but prosecution was not without danger for the accuser, and was not often resorted to. The Athenians treated these cases somewhat capriciously, but the juridical basis for prosecutions for *ἀσέβεια* is apparent in the oath taken by ephebes (above, p. 99).

The
hearth of
the city.

In a sense, the religion of the City-state was a family religion, although some cults, e.g. those of Zeus and Apollo, were represented in almost every city. The clearest form of ancestral worship is presented by the cult of Hestia at the central hearth of the city. Plato, in setting up his ideal State, orders that "the first step should be to found the temple of Hestia."⁴ The interesting point about the holy hearth at Athens is that it was originally the centre of the government, and closely connected with the Prytaneion; it was not moved, however, from the old Prytaneion to the later place of meeting called the Tholos. It represented the ancient hearth established by Theseus at the time of the traditional union of Attika (*συννοικισμός*). As it had been the hearth of the royal household, a "king" was kept to preside over it; it was the function of the king archon (*ἄρχων βασιλεύς*) to direct all ceremonies connected with

¹ PLUTARCH, *Perikles*, c. 32.

² THONISSEN, *Droit pénal*, pp. 178 ff.

³ AR. *Rhet.* III, 15, 8.

⁴ *Laws*, V, 745 b, μετὰ δὲ ταῦτα μέρη δώδεκα διελέσθαι, θέμενον Ἑστίας πρῶτον καὶ Διὸς καὶ Ἀθηνᾶς ἱερόν, Ἀκρόπολιν ὀνομάζοντα.

rites of purification. At Korinth it was usual to send out as leader of a colony a member of the ancient kingly line, the Bacchiadae, that he might carry over to the new city the fire from the mother hearth in Korinth. We read in Thukydides' story of the flight of Themistokles, that when he went to take refuge with Admetos of Thessaly, the king's wife, in her husband's absence, placed the fugitive beside the hearth, that is, under the protection of the gods of the house.¹

All these religious and political forms of the personification of the city are connected with the idea of nativity, breeding, succession. They show that the restricted form of democracy characteristic of the Greek city was determined by the federation of kindreds which formed its structural framework.

¹ THUK. I, 136. See also AR. *Pol.* VIII (VI), 1322b 28; also PAUSANIAS, V, 155, and HERODOTOS, I, 146, on the migration of the hearth. See on the social aspect of the Hestia-Vesta cult, B. W. Leist, *Alt-arisches Jus civile*, I, 80 ff.

CHAPTER VI

THE CITY AND THE CITIZEN

1. *The City as a juridical person.*

Peculi-
arity of
Greek
public
law.

It is strange that although the organization of the Greek States has been treated over and over again in all its minute details, no comprehensive attempt has been made to state the fundamental doctrines of Greek public law, if we except Aristotle's work on the *Politics*.¹ This is partly the result, of course, of the differentiation of the Greek people into many separate commonwealths; but yet as regards leading principles it is possible, and indeed necessary, to try to reconstruct the juridical concepts which governed public life. They inevitably group themselves round the idea of democracy, because even in the States ruled by the few the participation of the general body of citizens was admitted in some form or other, and exerted its influence on public law.

We have to start from an inquiry into the peculiar manner in which the Greeks understood the connexion between the commonwealth as a unity and the single citizens as members of the State. Of course the preponderance of the city over all private interests may be considered as an axiom; it is expressed, for instance, in Aristotle's *Politics*:² "The State is by nature clearly prior to the family and to the individual, since the whole is of necessity prior to the part; for example, if the whole body be destroyed, there will be no foot or hand. . . . The proof that the State is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole." But, on the other hand, the commonwealth was

¹ SZANTO, *Das attische Bürgerrecht*, pp. 1 f.

² AR. *Pol.* I, 2, 12, 1253 a.

never thought of in abstract terms as separate from its concrete members; another passage of Aristotle¹ lays stress strongly on the fact that the properly constituted city may be defined as the sum of the citizens, that is, of those who have a share in the sovereign power over it. "He who has the power to take part in the deliberative or judicial administration of any State is said by us to be a citizen of that State; and, speaking generally, a State is a quantity of citizens sufficing for the purposes of life." This is more than a theoretical construction: the principle leads to some very significant inferences.

To begin with, it is difficult from this point of view to draw a rigid opposition between the commonwealth as a corporation and the citizens as individuals. The well-known problems which arise in our modern theory of legal personality as applied to the State appear in a peculiar light in Greek surroundings. What was the dominant doctrine in Greece in the fifth and fourth centuries B. C., concerning the juridical personality of the State? We are not now speaking of details of political organization and administration; but we have to inquire how far the Greek commonwealths were juridical persons or what we should call corporations of public law. The question whether the State is a corporation may be considered from two points of view; we may examine it in connexion with the working of positive law; in this sense there can be no objection to the assumption that the State in relation to the citizens is a corporate body—the greatest of them all, but still analogous to other corporations such as chartered companies. From another point of view we may consider the question in relation to the historic growth of particular communities; we have to look in this case chiefly at the matter-of-fact evolution which conditions the juridical formation of the State. What is really important here is not the vindication of certain rights as being corporate, but the actual

¹ *Ibid.* III, 1, 12, 1275 b α' γὰρ ἐξουσία κοινωνεῖν ἀρχῆς βουλευτικῆς ἢ κριτικῆς, πολίτην ἢ δὴ λέγομεν εἶναι ταύτης τῆς πόλεως, πόλιν δὲ τὸ τῶν τοιούτων πλῆθος ἰκανὸν πρὸς αὐτάρκειαν ζωῆς, ὡς ἀπλῶς εἶπεῖν. Cf. *Ibid.* I, 6, 1275 a πολίτης δ' ἀπλῶς οὐδενὶ τῶν ἄλλων ὀρίζεται μᾶλλον ἢ τῷ μετέχειν κρίσεως καὶ ἀρχῆς. τῶν δ' ἀρχῶν αἱ μὲν εἰσι διηρημέναι κατὰ χρόνον, . . . ὁ δ' ἀόριστος, οἷον ὁ δικαστῆς καὶ ἐκκλησιαστής.

predominance of particular groups which assert their will in consonance and identity with that of the State.

Historical
life of the
City.

In a great measure the Greeks were keenly alive to the fact that every State possesses a moral and legal continuity distinct from the actual individuals who make up its population. It is a being with its own life, character, and historical identity. This historical and collective community of national life was perceived, and frequently discussed, in ancient Greece. In a passage in one of the minor dialogues ascribed to Plato¹ the author urges that Athens in the whole of its history was definitely one: "Then as now, and indeed always, from that time to this, speaking generally, our government was an aristocracy—a form of government which receives many names, according to the fancies of men, and is sometimes called democracy, being really an aristocracy of the many who love virtue . . ."

The author goes on to contradict the view that we must distinguish between several different kinds of Athens: that which existed under the kings, that which existed under the *régime* of democracy, and so forth. Athens, he declares, was never conquered; its kings still exist in democratic Athens as they did in former times, and on the whole it may be said that Athens is still governed by an aristocracy. This is obviously a fiction, but the point Plato tries to impress on his readers is that Athens lived a continuous constitutional life, and the history of the people is represented as one consecutive process. The point of view, however, is after all a cultural one; its juridical inferences are not definitely drawn. It may be regarded as the germ of the idea of an organic evolution of the State, but as yet the idea is expressed in a very incomplete manner.

Let us ask what term could be used by the Greeks to characterize the commonwealth of Athens considered as a moral personality. The word *πόλις* was an expression in

¹ *Menexenos*, 238 c d ἡ γὰρ αὐτὴ πολιτεία καὶ τότε ἦν καὶ νῦν, ἀριστοκρατία, ἐν ἣ νῦν τε πολιτεύομεθα καὶ τὸν αἰὶ χρόνον ἐξ ἐκείνου ὡς τὰ πολλά. καλεῖ δὲ ὁ μὲν αὐτὴν δημοκρατίαν, ὁ δὲ ἄλλο, ὃ ἂν χαίρη, ἔστι δὲ τῆ ἀληθεία μετ' εὐδοξίας πλήθους ἀριστοκρατία· βασιλῆς μὲν γὰρ αἰὶ ἡμῖν εἰσιν· οὗτοι δὲ τότε μὲν ἐκ γένους, τότε δὲ αἰρετοί· ἐγκρατές δὲ τῆς πόλεως τὰ πολλά τὸ πλήθος, τὰς δὲ ἀρχὰς δίδωσι καὶ κράτος τοῖς αἰὶ δόξασιν ἀρίστοις εἶναι.

very general use, but the term commonly used was *δημος*. A third expression, *κόσμος*, is not used frequently. It indicates rather the fact that the State does not consist in a concourse of people, which constitute its population, but that these people are organized in a certain order.¹

This point of view is emphatically expressed by Aristotle in the *Politics*:² “When the race of inhabitants as well as their place of abode remain the same, are we to say that the commonwealth is also the same, although the citizens are always dying and being born, as we are accustomed to speak of rivers and fountains being the same, although the water in them is constantly coming in and flowing away? Or shall we say that the human population remains the same for the above-mentioned reason, but the commonwealth is different? For if a commonwealth is a union, namely a union of citizens sharing in political life, it seems necessary to maintain that the commonwealth is not the same when the constitution is changed, in the same way as we say of a chorus that it is a tragic one or a comic one, although it may consist of the same persons. . . . And if this is true, it is evident that the sameness of the State consists chiefly in the sameness of the constitution, and may be called by the same name, whether the inhabitants are the same or entirely different.” Here Aristotle faces the problem in a very business-like manner; to the question how are we to consider the city as an organic unity, he replies that we shall find it in the *κοινωνία πολιτῶν πολιτείας*. It is the fact that such a definite principle binds people together under a certain constitution that makes a commonwealth. It is, in fact, the *κοινωνία πολιτῶν πολιτείας* which represents the unity of State personality.

Juridical
life of the
City.

But this view was not accepted without qualifications. Changes might occur in the actual policy of the State and yet the national life would go on with a kind of organic continuity nevertheless. When the Thirty were overthrown in Athens, after the short rule of oligarchy, they left

¹ See HIRZEL, *Themis*, &c, pp. 283 ff.

² *Pol.* III, 3, 6, 1276 b (ending) εἰ δὴ τοῦτον ἔχει τὸν τρόπον, φανερόν ὅτι μάλιστα λεκτέον τὴν αὐτὴν πόλιν εἰς τὴν πολιτείαν βλέποντας· ὄνομα δε καλεῖν ἕτερον ἢ ταῦτόν ἐστι καὶ τῶν αὐτῶν κατοικοῦντων αὐτὴν καὶ πάντων ἐτέρων ἀνθρώπων.

behind them considerable debts. It is very remarkable that although the rule of the Thirty was directly opposed to the main principles of Athenian democracy, the *δῆμος* took over and made itself responsible for the debts which the oligarchs had incurred. This is, perhaps, the most striking example in Athenian history of what Isokrates calls the *ἐπιείκεια* of the Athenian people; but just because it was often cited and admired, it can hardly be treated as a normal case. As a rule, far-reaching political revolutions put an end to the liabilities of commonwealths, and each *πολιτεία* was supposed to embrace the life of a particular collective being.

To sum up, Aristotle does not give us a definite solution of the problem stated by him; he presents both sides, and although he inclines towards the view that it is the unity of the constitution which sets limits to the juridical existence of the commonwealth, he is willing to admit that from a higher or "humane" point of view it would be fair to consider the unity of a people's life historically rather than juridically: wherever there is continuity of national life the growth of one personality of public law might be recognized.

The nearest approach to a conception of a corporate life of the State distinct from that of the individuals composing it was obtained in the idea of State religion. Every Greek commonwealth had as it were representatives of its historical life in the gods protecting the State and revered as its divine leaders.¹

A second inference from the intimate connexion between city and citizens in Greece consists in the fact that the city is understood primarily as the complex of the individuals who compose it. The element of territory does not play a great part in the realization of its existence. Remarkable and by no means uncommon cases occur in which the city is separated, as it were, from its geographical basis and yet continues to assert itself as an entity of public law. I mean especially the cases when a great number of citizens had to leave their home-land in consequence of disturbances or

¹ See above, p. 97. Cf. WIDE in GERCKE und NORDEN, *Einleitung*, II, pp. 217 ff.

conquests. A classical example is the building up of a complete commonwealth by the Athenian fleet in Samos at the time when the oligarchs overthrew the regular government in Athens.¹ In the same way the return of the exiles after the collapse of the Thirty² was not regarded as a new period in constitutional development, but merely as a re-affirmation of a legal arrangement which had never ceased to exist.

A third feature of the situation is disclosed by the manner in which Greeks effected the representation of the city on occasions when the commonwealth had to act as a unit of public law. The case arose, to begin with, when treaties had to be ratified and confirmed by oath. In the inscription relating to the treaty of 446-5 B.C. between Athens and Chalkis,³ we find that the oath was to be taken by "all the Chalkidians who had reached manhood;" but as such a process is bound to be exceedingly cumbersome and difficult to carry out in practice, the corresponding oath of the Athenian Demos is restricted to "the members of the Council and of the Heliaea." According to Aristotle's definition, as we have seen above, these latter are to be considered as the citizens exercising the supreme functions of government. In the case of the treaty between Athens and Eretria⁴ the Athenian citizens are represented by "the commanders, the Council, and the knights;" and in that with Selymbria in 409 B.C.⁵ by the commanders, the trierarchs, the hoplites, and any other Athenians who were there! In the case of smaller cities an attempt was often made to call up all the citizens, although in Athens, which was a comparatively large commonwealth,

View of
the City
represent-
ation.

¹ THUC. VIII, 75-77.

² *Ath. Const.* c. 41.

³ DITT. *Syll.* I³, 64, p. 79 ὁμόσαι Ἀθηναίων τὴν βολὴν καὶ τοὺς δικαστάς . . . ὁμόσαι δὲ Χαλκιδέων τοὺς ἐβόντας ἅπαντας.

⁴ *Ibid.* I³, 123, p. 168 ὁμόσαι δὲ Ἀθηναίων μὲν τοὺς στρατηγούς καὶ τὴν βουλὴν καὶ τοὺς ἰππέας.

⁵ *Ibid.*, 112, p. 150 ὤμοσαν Ἀθηναίων οἱ στρατηγοὶ καὶ οἱ τριέραρχοι καὶ οἱ ὄπλιται καὶ εἴ τις ἄλλος Ἀθηναίων παρῆν, καὶ Σελυμβριανοὶ πάντες. Cf MICHEL, 19, and *ibid.*, 21, p. 26 κυρωθείσας δὲ τῆς συνθήκας ἐλέσθω ὁ δᾶμος παραχρῆμα ἄνδρας πέντε· τοὶ δὲ αἰρεθέντες μετὰ τῶν παραγεγενημένων ἐξ Ἱεραπίτνας πρεσβευτῶν ὀρκιζάντων τὸν νόμιμον ὄρκον Ῥοδίου ἅπαντας τοὺς ὄντας ἐν ἀλικίαι.

representation is restricted to some one or other group of prominent citizens. The fact, however, remains that these prominent representatives appear in different combinations, and this shows that there was no standing organ representing the city in its treaty-making capacity, but that a certain number of influential citizens were acting for the rest.

Another case in which the city materialized as a corporate unit is presented by the conclusion of city loans. This was an occasion in which the distinction between the property of the city and that of its individual members arises in a most natural manner. In a number of cases such a distinction was actually drawn; take e.g. the inscription *C. I. G.* 1569: the πόλις as a whole incurred the obligation, and the pastureland of the πόλις was to be the security in case of failure to pay. There are, however, a number of instances in which recourse is had to the private property of individual citizens in order to guarantee the payment of a loan and to provide material security for the execution. The most remarkable case is that of Arkesine in the island of Amorgos. Inscriptions furnish details of two instances in which bankers granted loans to the city; in both, the city treasurers were responsible for the payment of the interest due, and were liable to arrest and seizure of their goods in the event of non-payment; as for the capital sum the security was all the common property of the city as well as the private possessions of the citizens. If payment were not made at the agreed term, the creditor in each case was to recover the sum "by every means of execution on all the common property of the citizens and their private property wherever found."¹

In another inscription² we find that instead of making all the citizens liable in their private fortunes for the payment of a city debt, the creditor picked out the principal

¹ *I. J. G.* I, xv, A and B, pp. 313 ff., e.g. A, § 6 καὶ ἐξέστω πράξασθαι Πραξικλεί ταῦτα τὰ χρήματα πράξει πάσῃ ἐκ τε τῶν κοινῶν . . . καὶ ἐκ τῶν ἰδίων τῶν Ἀρκεσινῶν . . . καὶ ἐξ ἑνὸς ἑκάστου . . . καὶ ἐξ ἀπάντων. In the case of the city of Iulis (*DITT. Syll.* I, 173; MICHEL, 95) execution was also evidently directed towards all the property available within the territory of the city.

² *I. J. G.* I, xiv, pp. 277 ff.

magistrates and the ten wealthiest citizens of the city contracting the loan. "Nikarete . . . made a loan (to certain persons named, representing the city of Orchomenos). The borrowers or the sureties shall pay back the money (on a certain day). If not, execution shall be made upon the borrowers (i. e. the magistrates), and the sureties alike, singly, severally, or all at once, and upon their goods."¹ The transaction was a complicated one, and there is some controversy as to a point of detail. Was the city to reimburse Nikarete in the case of failure of payment in term concurrently with the wealthy citizens selected as securities? or was the latter's liability to come in only in case of the insolvency of the city? If the first interpretation² is the right one, then we should have a case of payment of the double of the debt as a fine for failing to keep the term. If the second interpretation³ is preferred, we have simply to do with a case of guarantors entering on their liability in the place of the principal. There is something to be said for both views, but it is not necessary for our purpose to form a definite decision as to this point. What seems material is the fact that private citizens were constrained to come up with their property for the repayment of a debt incurred by the city. In the case of Arkesine the enforced liability fell on all the citizens; in the case of Orchomenos the wealthiest were picked out according to the usual practice of *λειτουργίαι*. Anyhow it would not do to consider the arrangement merely from the point of view of the convenience to the creditor; it undoubtedly illustrates the peculiar conception of Greek public law as regards the political tie between the commonwealth and its members.

There is nothing in Greek law corresponding to the notion of the *fiscus* as a separate subject of rights differentiated from the State. The obligations of the commonwealth in its fiscal affairs are intimately connected and mixed up with the political life of the city. As a result the enforce-

Fiscal institutions.

¹ *Ibid.*, pp. 280-282, VI A ἡ δὲ πράξις ἔστω ἕκ τε αὐτῶν τῶν δανεισαμένων καὶ ἐκ τῶν ἐγγύων καὶ ἐξ ἑνὸς καὶ ἐκ πλειόνων καὶ ἐκ πάντων καὶ ἐκ τῶν ὑπαρχόντων αὐτοῖς πραττούσῃ ὃν ἂν τρόπον βούληται.

² Proposed by SZANTO, *Wiener Studien*, VII.

³ The reading of the editors of *I. J. G.*

ment of liabilities falling on the city is dependent on the action of the Assembly, the Council, and the various financial officers. The only point on which we see a beginning of differentiation of the two spheres of private and public rights is the use of the judicial process to verify the proper carrying out of confiscations. When citizens deem themselves aggrieved by the arbitrary action of authorities in such a case they may claim a judicial inquiry, and a *διαδικασία* will take place. Lysias' speech on the Unjust Claim of State Funds¹ presents a good instance of the procedure. In this case one Eraton had incurred a debt, and had died without paying; his sons failed to pay the interest. The creditor obtained an order for the payment of the entire debt, principal and interest. Various complications ensued, and he then brought an action for the satisfaction of his claim; this action was brought against the Treasury because the State had confiscated the property from which the debtor was to make good the debt. In other respects the situation of the city as regards individual citizens in matters of pecuniary liabilities cannot be said to be based on reciprocal rights and obligations. While claims against the city can be enforced only with its good will, and are not made secure by coercive measures, apart from proceedings against officers, the claims of the city against its debtors are backed by exceedingly stringent measures, especially as regards those who failed to pay contributions or to deliver public money. A heavy fine of double the amount due was claimed after a very short respite; and the insolvent debtor could be eventually coerced by an execution directed not only against his property but also against his person.²

Consolidated funds.

On the other hand, there was no regular budget, and income and expenses were squared on the basis of laws and decrees passed from time to time by the community. Interesting attempts were made to create certain consolidated funds in order to meet the most important expenses. The first attempt of this kind was made on the initiative of

¹ LYS. XVII.

² PARTSCH, *Griechisches Bürgerschaftsrecht*, pp. 312 f.

Themistokles when he persuaded the people to reserve a hundred talents of the proceeds from the silver mines of Laurion for the building of a fleet. The account of this political measure is interesting in so far as the original intention of the Athenians was to divide the money among the citizens. In the time of the first Athenian League a large fund was collected for war expenses, and although eventually the people began to use part of it for the purpose of embellishing the city (the building of the Parthenon, Propylaea and so on),¹ the consolidated fund was still very large towards the beginning of the Peloponnesian War.² Out of this fund one thousand talents were kept as a special reserve in case of extremity. The heavy expenses entailed by the conflict with Sparta led, however, to the complete exhaustion of this fund, and the collapse of Athens after Aigospotamoi broke down the power which made such a fiscal policy possible; the League had been destroyed, and there were no more contributions to collect from the Allies for the use of the city.

In a sense the subsequent fiscal history is even more characteristic, because the resources of the city had to be drawn chiefly from Athenian citizens themselves. The main expedient was to ransom, as it were, the wealthier people in order to keep the democratic majority in good humour. In his second *Olynthiac* oration Demosthenes refers to this policy of the Demos³: "If you assign to one body of men the function of issuing orders to you, like tyrants; to another, that of compulsory service as trierarchs or tax-payers or soldiers; and to another, only that of voting their condemnation without taking any share in the labour, nothing that ought to be done will be done in time." By the help of such exactions the people made provision for securing a constant flow of money to the *θεωρικόν*,

¹ See PLUTARCH, *Perikles*, c. 12 and 13.

² According to THUKYDIDES, II, 13, the amount had been 9,700 talents, of which 6,000 talents remained in 431 B.C. As to the reserve, see *ibid.*, c. 24.

³ DEM. II, 30. Cf. ISOKRATES, XII, 140 . . . ἐκ δε τῶν κοινῶν ταῖς ἰδίαις ἀπορίας βοηθεῖν ζητούντων, . . . καὶ πρὸς τοῦτοις ἐκείνους τοὺς τὰ μὲν τῶν ἄλλων κτήματα τῆς πόλεως εἶναι φάσκοντας, τὰ δὲ ταύτης ἴδια κλέπτειν καὶ διαρπάζειν τολμώντας.

a consolidated fund destined to provide for payments in connexion with the attendance at the theatre on festal occasions. One of the most humiliating episodes of the political history of Athens in the fourth century is the struggle between public-spirited leaders like Apollodoros and Demosthenes, who insisted on the needs of the war equipment, as against demagogues like Agyrrhios and Eubulos, who cajoled the Demos by persuading it to earmark public money for popular amusements.

The
treasuries
of the
gods.

A peculiar device of Greek political life for meeting permanent fiscal demands consisted in assigning large sums of money to the gods. The temple of Athene Polias was to some extent a treasury in which a reserve fund for the public administration of Athens was kept to meet emergency requirements.¹ The religion of the city was, as we shall often have to remark, a definite side of its political life, so that there was nothing strange in the fact that the Assembly passed decrees to direct the treasurers of the goddess to make certain payments in order to square the expenses of some expedition to Thrace or to the Islands, and for similar political purposes.² A decree published in the first volume of Dittenberger's collection gives detailed directions as to the disposal and management of the various monies kept in the temple of Athene; some of these funds are public, and are managed by Hellenotamiae; they are surplus revenue derived from the tribute (*φόροι*), and are to be kept apart from the treasure of the goddess.³ The decree orders the repayment of a big loan which was made in critical circumstances by order of the people from the fund of the goddess. Three thousand talents were borrowed at a nominal rate of interest, and we know that such operations were constantly repeated during the great

¹ BOECKH-FRAENKEL, *Staatshaushaltung der Athener*, I, pp. 195 ff.

² DITT. *Syll.* I³. 94, pp. 123 ff. ταμίαι ἱερὸν χρηματὸν τῆς Ἀθηναίας . . . παρέδοσαν ἑλληνοταμίαις . . . ὅστε δῶναι τοῖς τριεράρχοις ἐς Ἄργος τοῖς μετὰ Δεμοσθένης. ἔδοξεν τῆ βολῆι καὶ τοῖ δέμοι . . . ἀποδοῦναι τὸς ἑλληνοταμίαις καὶ τὸς παρέδρους τοῖς ταμίαις τῆς θεῆς, . . . καὶ τὸς ταμίαις τῆς θεοῦ πάλιν παραδοῦναι τοῖς ἑλληνοταμίαις καὶ τοῖς παρέδρους, τοῦτος δὲ δῶναι στρατηγοῖς ἐπὶ Θράκιες.

³ *Ibid.* I³. 91 b, pp. 118 ff. ἐκ δὲ τὸν φόρον κατατιθέναι κατὰ τὸν ἑνιαυτὸν τὰ ἑκάστοτε περιόντα παρὰ τοῖς ταμίαισι τὸν τῆς Ἀθηναίας τὸς ἑλληνοταμίαις.

war. Decrees ordering such loans could not be passed quite as easily as other measures; special permission of the people had to be asked in order to avoid the law which forbade orators to propose any decree tampering with the property of the goddess. But the necessary *ἀδεια*¹ was carried over and over again; so that the treasure of Athene could be considered as practically a reserve fund of the city.

All these peculiarities of Athenian fiscal administration are consequent on the main feature of Greek political life: the State was all-powerful as against the single citizen, but at the same time it was regarded not as a being separate from its live members, but as a complex of citizens (*πλήθος*²), whose interests and rights are not differentiated from the interests of the "corporation." Hence, on the one hand, the use and abuse of political power for the satisfaction of personal needs and cravings; on the other hand, the ruthless exploitation of private property in the interests of the majority. One might almost say that with a slight change Bentham's idea of the aim of political union could be applied to this system; it was directed towards the greatest advantage of the greatest number of citizens.

2. *The Rule of Law.*

Apart from material profits, citizenship gave access to a highly privileged position in the legal domain. An Athenian citizen could claim rights which were refused to other classes of the population of Attika, and his legal standing corresponded in many ways to modern ideas of democratic freedom. The "rule of law" applied primarily to this privileged class.³ Personal security.

The exercise by the magistrates of their powers as determined by law was carefully watched. The position of the magistrates was entirely different in Greece from what it was in Rome, where the magistrate's authority was based upon his *imperium*. In Greece, the principle was

¹ *Ibid.* 194.

² *AR. Pol.* III, 1, 12, 1275 b. See above, p. 103.

³ See DEMOSTHENES, XXIII.

rather to put the magistrates in such a position that they should always be subject to the superior authority of the community. We may take as an illustration of this view a passage from the speech of Lysias against the Corn-dealers. In this case certain persons were accused of having infringed the law forbidding any one to buy more than fifty measures of corn. The enactment was designed to prevent hoarding and monopoly. Referring to the policy of the law, Lysias describes one of the accused as having admitted that he bought more than the legal quantity, pleading, however, that it was at the bidding of the archons that he had done so. Then Lysias turning to the Court says: "If he shows that there is a law which bids corn-dealers buy up corn if the archons tell them to, acquit him; if not, justice demands condemnation. For we have put before you the law which forbids any one in the city to buy more than fifty measures of corn."¹

On the other hand, the Roman rule as to appeal to the people, which provided the Roman citizen with a safeguard against any arbitrary action by a magistrate, cannot be said to have existed in that definite form in the Athens of the fifth century. It materialized, however, into a clear legal guarantee in connexion with a reform brought about by Eumelides at some date about 400 B.C. When a certain Lysimachos had been arrested and condemned to death by the Council, Eumelides rescued him, declaring that no citizen ought to be put to death without the verdict of a Court of law; a trial took place, and the Court acquitted Lysimachos. Thereupon a law was enacted providing that, in cases where the Council condemned or penalized a man, the Thesmothetae were to bring the verdicts and the penalties before the Courts, and whatever the Heliasts decided by their vote should stand.²

But the most usual means of keeping the magistrates in order was provided by the right of every citizen to attack and arraign a magistrate who had actually broken the law.

¹ Lys. XXII, 5, 6.

² *Ath. Const.* c. 45 ὁ δῆμος . . . νόμον ἔθετο ἄν τις ἀδικεῖν ἢ βουλή καταγῶ ἢ ζημιώσῃ, τὰς καταγῶσεις καὶ τὰς ἐπιζημιώσεις εἰσάγειν τοὺς θεσμοθέτας εἰς τὸ δικαστήριον, καὶ ὅτι ἂν οἱ δικασταὶ ψηφίσωνται, τοῦτο κύριον εἶναι.

This was regarded as a most potent safeguard against abuses, although this rule certainly gave occasion for many unjust prosecutions by sykophants. In addition to this there were positive rules in Athens which imposed penalties upon magistrates for an improper use of their authority. Thus the archons were obliged to take an oath that they would not accept bribes or be guilty of any other form of corruption. The oath of the members of the Council of Five Hundred bound them not to imprison wantonly any Athenian citizen; ¹ they were obliged to allow bail on three securities. Now with regard to the oaths of the Council not to interfere with individual liberty, there is a curious contradiction in our authorities. Aristotle in the *Athenian Constitution* ² tells us of the action of a certain Archinos, a leader of the restored democracy, who persuaded the Council to put to death without trial a citizen whom he suspected of treasonable designs. Aristotle makes much of this as a most important fact, for by it, he says, a large number of people were undoubtedly deterred from conspiracy. ³ It seems clear that the *βουλή* took upon itself the duties of the *ἐκκλησία*. In the fifth century such discretionary power undoubtedly existed, and in a time of political agitation an act of State of this kind might be resorted to, and certainly was sometimes used by the Areiopagos, or at a later time by the Five Hundred. It broke down, however, after the restoration of democracy; and when the liberty of the individual is absolutely safeguarded, the rule of law is practically complete.

How could this rule of law be made effective? We have seen already that the right of private citizens to prosecute offending officers kept the government within due limits. This right of accusation is one of the fundamental principles of the Athenian constitution, though it is difficult from the extant materials to put together a clear statement of the rules which governed it. But it is apparent throughout the whole Greek system that its importance was enormous.

Enforcement of
legality.

¹ DEM. XXIV. 144.

² *Ath. Const.* c. 40.

³ See the case of Lysimachos, p. 114 above, and a study by P. CLOCHÉ in the *Revue des études grecques*, XXXIII.

Right of
political
accusa-
tion.

Hence it was sometimes said that the principal reform of Solon consisted in the fact that he gave every citizen the right to take up the cause of a fellow-citizen and help him to obtain justice. The following passage from the speech of Hypereides for Euxenippos deserves attention:¹ "Among the many splendid arrangements that exist in the city, what is there better or more popular (democratic) than the fact that, whenever a private person standing trial and danger is unable to speak in his own defence, any one of his fellow-citizens can if he likes come forward to help him and instruct the jury as to the rights of his case." Now what is said here with regard to the defence of the weak by the strong applies, of course, as much when an accusation is to be brought as when a defence is to be maintained. The right of accusation, in spite of all its defects and disadvantages, undoubtedly was one of the greatest bulwarks of the constitution. In the speech of Lykurgos against Leokrates the orator speaks of the different elements of an action at law.² They are: (1) the parties to the suit, (2) the law, (3) the judge. The law must lay down what is allowable within the limits of the action to be tried, the judges must find out whether the acts put in issue are within the scope of the law; but neither the one nor the other is of any avail unless somebody is ready to come forward as an accuser and to deliver the delinquent for judgement to the sovereign people. The power of accusation was more than a mere private right. Its essence was that it was political, and its value consisted in the meting out of punishment to those who had violated a law or exceeded their duty.

3. *The Privileges of Citizens.*

¹ Ἐλευθερία. The status of a citizen assumed a particular importance from the point of view of the close connexion between State and individual interests; ἔλευθερία as a basis of citizenship was a privilege in itself, inasmuch as it ensured a share in the rights of the ruling class towering over a body of sub-

¹ HYP. IV (III), 11.

² LYK., *op. cit.*, 4.

jects.¹ The juridical inferences are well illustrated by the history of citizenship in Athens. We need not trace the process of its development further than the reforms of Kleisthenes, which broke the political power of the ancient clans. This crisis introduced a number of freedmen and foreigners into the precincts of Athenian citizenship.² Prosperous democracy, however, took care to narrow the limits of the conception.

The legal conditions of citizenship are very clearly set down in cases when the right of citizenship was acquired not by birth, but by a grant of the people. Such grants were made on special occasions, and exact information about them has been preserved in many inscriptions. They conferred the full right of taking part in all matters human and divine—*μετέχειν ἀνθρωπίνων καὶ θείων (δσίων)*. This meant that the recipient acquired a position within the circle of the ruling class, was eligible to offices, and was admitted to the cults of the State religion. One of the first decrees of this kind preserved for us—the inscription of Chaladria³—gives the new citizen access to political office by describing him as *φισοπρόξενος καὶ φισοδαμιουργός*. The inscription is interesting also inasmuch as it shows that the addition of *ἴσος* to the notion of *πολιτεία* did not imply any special form of grant of citizenship. Originally *ἰσοπολιτεία* and plain *πολιτεία* are equivalent terms, and it is only gradually that the idea of reciprocity between two States is brought into the connotation of the term *ἰσοπολιτεία*.⁴ One important consequence of the full admission to political rights by naturalization consists in the fact that the Greeks had no objection to the cumulation of several citizenships in one person. In this way they were less exclusive than the Romans.⁵

Such arrangements of *συμπολιτεία* shaded off gradually

Συμπολιτεία.

¹ *Ar. Pol.* I, 2, 1252 a, on τὸ ἄρχον καὶ τὸ ἀρχόμενον. See above, p. 13.

² *Ibid.*, III, 2, 1275 b οἷον Ἀθίμησιν ἐποίησε Κλεισθένης μετὰ τὴν τῶν τυράννων ἐκβολήν· πολλοὺς γὰρ ἐφυλέτευσε ξένους καὶ δούλους μετοίκους.

³ MICHEL, 194, p. 179 Ἄ φράτρα τοῖρ Χαλαδρίοιρ : καὶ Δευκαλίονι : Χαλάδριον ἔμεν αὐτὸν καὶ γόνον : φισοπρόξενον, φισοδαμιουργόν : τὰν δὲ γὰρ ἔχεν τὰν ἐν Πίσει . . . φισοπρόξενος is not taken in the sense of honorary guest, but in that of a magistrate.

⁴ SZANTO, *Griech. Bürgerrecht*, pp. 67 ff.

⁵ MICHEL, 285. *I. J. G.* I, xi, p. 180 ff.

into cases where the individuality of one of the States was merged into that of the other; in other words *συμπολιτεία* and *συνοικισμός* are connected by a variety of transitions. An interesting case is shown in the inscription recording the treaty of friendship made at the desire of King Seleukos between Smyrna and Magnesia about the middle of the third century B.C.¹ "The Smyrnaeans gave citizenship (*πολιτείαν*) to the dwellers in Magnesia . . . The Magnesians shall share as citizens with the Smyrnaeans according to the laws of the city, without faction, having the same friends and enemies as the Smyrnaeans . . . To the dwellers in Magnesia citizenship in Smyrna to be given on the same terms as to the other citizens; and in like manner citizenship to be given to the rest of those dwelling in Magnesia who are of free birth and Hellenic race." A special case arose when a definite political tie was kept up between a metropolis and its colonies. In all cases religious intercourse was continued; we have evidence in regard to that in the inscription relating to the foundation of Brea by the Athenians,² and as regards the relations between Korinth and its colonies.³

These relations established by treaties form, as it were, a step towards the formation of federal governments, which are in Greece based on a wide autonomy of the component members and on their alliance for certain specified objects connected mainly with defence. It is well known that such federal governments came to play a very important part during the Hellenistic period, when single cities were in most cases too weak to maintain their political independence. But rudimentary forms of federation occurred already in earlier times. The best example is presented by the Boiotian League referred to by Thukydides.⁴ He describes how the Boiotarchs planned an alliance with

¹ MICHEL, 19, p. 16 *πολιτεύονται δὲ μετὰ Σμυρναίων κατὰ τοὺς τῆς πόλεως νόμους ἀστασιάστως τὸν αὐτὸν ἐχθρὸν καὶ φίλον ἡγούμενοι Σμυρναίοις . . . Δεδόσθαι δὲ τοῖς ἐν Μαγνησίᾳ κατοικοῖς . . . πολιτείαν ἐν Σμύρνην ἐφ' ἴσῃ καὶ ὁμοίαι τοῖς ἄλλοις πολίταις· ὁμοίως δὲ δεδόσθαι τὴν πολιτείαν καὶ τοῖς ἄλλοις τοῖς οἰκοῦσιν ἐν Μαγνησίᾳ ὅσοι ἂν ὦσιν ἐλεύθεροί τε καὶ Ἕλληνες.* (HICKS, 176.)

² MICHEL, 72. HICKS, 29.

³ GILBERT, *Staatsaltertümer*, II, p. 87.

⁴ V. 38.

certain other cities and "communicated their intentions to the Four Councils of the Boiotians, whose sanction is always necessary."

4. *Societies and Unions.*

In considering the general relation between the State and the citizen we come across a problem of capital importance as regards the existence and the political treatment of intermediate combinations between individuals. There are cases when such combinations are prohibited, as for instance in France after the Revolution of 1789; in other cases social combinations are allowed on condition of an express recognition by the State, as in Rome; in yet another group of instances a marked juridical difference is made between various forms of societies, and special privileges are attached to corporations authorized by the State, as in English law. There are, lastly, examples of complete freedom as regards the formation of societies. This last category is represented by Greek jurisprudence.

Freedom
of com-
bines.

It is true that at first glance our principal guide, Aristotle, appears to connect associations of all kinds with the State. We read in the *Ethics*,¹ "All associations appear to be parts of the political association." But it is evident on closer consideration that the philosopher did not want to lay down any rule as to the influence of the city on the formation, prohibition, or supervision of associations. The examples which he mentions in the same chapter,² and his way of grouping them according to aims, show conclusively that he is thinking primarily of voluntary associations. He cites partners of a shipping concern (*πλωτῆρες*) and soldiers (of fortune) who join in a military expedition; he contrasts companies formed for the sake of obtaining profits with societies which aim at pleasant pastimes in connexion with

¹ *Eth. N. VIII*, ix, 1160 a, 28 *πάσαι δὴ φαίνονται κοινωνίαι μέρια τῆς πολιτικῆς (κοινωνίας) εἶναι.*

² *Ibid.*, 1160 a, 14 ff. *αἱ μὲν οὖν ἄλλαι κοινωνίαι κατὰ μέρη τοῦ συμφέροντος ἐφίενται, οἷον πλωτῆρες . . . συστρατιῶται . . . ὁμοίως δὲ καὶ φυλέται καὶ δημόται· ἔναια δὲ τῶν κοινωνιῶν δι' ἠδονὴν δοκοῦσι γίνεσθαι, θιασωτῶν καὶ ἔρασιωτῶν. αὐταὶ γὰρ θυσίας ἔνεκα καὶ συνουσίας.*

sacrifices and common meals. His remark that all (private) associations are part of the general political one is therefore significant in so far as it shows that he did not make a distinction in principle between ties of friendship, common interest, and social intercourse on the one hand, and the ties of political union on the other. All these varieties were considered by him from the point of view of the natural tendency of men, acting as social beings (*ζῶα πολιτικά*) to form combinations of various kinds and various degrees of cohesion between their members. Thus, while he did not pay attention to the contrast between temporary enterprises and associations for permanent ends, he laid stress on the *reality* of all social combinations, from the lowest to the highest, and traced them all to the political, or rather social, tendency of human nature.

This general view is confirmed and developed on all points by a consideration of the actual facts of Greek law. To begin with, we have the rare advantage in this case of possessing the text of a law by which Solon regulated the relation between societies and their members. It has been preserved in a fragment of Gaius inserted in the *Digest*.¹ *ἐὰν δὲ δῆμος ἢ φράτορες ἢ ἱερῶν ὀργίων ἢ ναῦται ἢ σύσσιτοι ἢ ὀμόταφοι ἢ θιασῶται ἢ ἐπὶ λείαν οἰχόμενοι ἢ εἰς ἐμπορίαν, ὅτι ἂν τούτων διαθῶνται πρὸς ἀλλήλους, κύριον εἶναι, ἐὰν μὴ ἀπαγορεύσῃ δημόσια γράμματα.* There are minor doubts as to one or two points of the enumeration, but they have no material importance for us. The general tenor of the enactment is perfectly clear. The law of Athens, as stated on one of Solon's *ἄξονες*, allowed all kinds of associations to make rules or by-laws for their members provided that these did not clash with existing laws of the State. The enumeration of the societies is perhaps the most characteristic feature of the text. By the side of partnerships and companies formed for the sake of trade (*εἰς ἐμπορίαν*) and for the sake of privateering (*ἐπὶ λείαν*) stand sailors (*ναῦται*) and associations for common meals (*σύσσιτοι*), and for the use of common burial grounds (*ὀμόταφοι*), adepts of religious societies (*ὀργεῶνες, θιασῶται*), and at the top of the list

¹ *Digest*, XLVII, 22, 4 *Haec lex videtur ex lege Solonis tralata esse, nam illuc ita est (GAIUS, libro quarto ad legem duodecim tabularum).*

members of phratries and demes. In other words, no distinction is made in respect of the power to make decrees obligatory for members between purely voluntary associations for temporary ends, societies whose object is the satisfaction of some end permanent or at any rate enduring, and, lastly, recognized subdivisions of the city. This does not mean, of course, that there were no differences in fact between these various species, but from a legal point of view no sharp distinctions were drawn, and all varieties of social combination were left to shift freely for themselves.

The next question to be examined concerns the distinction Moral
persons. between casual combines and permanent unions. Even apart from State interference the juridical consequences of these two kinds of associations are bound to be different, but the contrast between them may be either strongly insisted upon or, on the contrary, disguised by gradual transitions. The latter was decidedly the case in Greece. Apart from the way in which various combines are mixed up both in Solon's law and in Aristotle's description, in every group of associations mere partnerships pass over imperceptibly into companies and into permanent unions. A striking example is presented by the peculiar form of combines termed *ἔραροι*. The word is used to designate the relations arising from a "friendly" loan—both between the creditors and the debtor and between the creditors who had contributed to raise the loan. The capital of the loan seems as a rule to have been the result of a collection, and no interest was charged on it, although conditions as to liability and terms of repayment were stipulated as in the case of an ordinary loan. The wide extent of such transactions in ancient Greece seems to have been connected with the frequent occasions when relatives and friends had to render assistance in case of sudden misfortune, for instance, for raising a ransom, paying a heavy fine, &c. In any case such *ἔραροι* were obviously casual arrangements, all traces of which disappeared on payment of the debt.¹ And yet the same term *ἔραρος* is used currently for durable associations formed with a view to common pastimes and

¹ LIPSIUS, *Attisches Recht und Rechtsverfahren*, 730 ff.

social intercourse. We may translate it "club" if we only keep in mind that most of these friendly circles were very small, consisting of "a score of people who met on certain days to dine together and to offer certain sacrifices. Our dining and reading clubs are the nearest parallel to these associations. In this case the aim was neither casual nor transient, but, on the contrary, tended towards permanency. Thus the constitutive elements of a "moral person" were clearly at hand, and in a great number of instances a material basis was provided for the continuous existence of the "corporation" by the gift or the acquisition of a house, some land, the building of a shrine, &c.¹ The frequency and importance of this kind of social combination is attested by the fact that trials arising out of relations between members of *ἐρανοί* as well as between these corporations and outsiders (*δίκαι ἐρανικαί*) formed a special category ranged together with *δίκαι κοινωνικαί*, and were treated as commercial cases by summary procedure, so that the case had to come up before the Court in the course of a month after its inception.² I have called attention to this remarkable instance of affinity between a contractual transaction, a form of partnership, and a club because it throws a strong light on the gradual transition in Greek law from occasional association to the enduring life of moral persons. The element of super-individual personality is represented even more clearly in another class of association, namely in societies formed for the purpose of religious worship or, at any rate, for occupations connected with some cult. Our earliest recorded instances of corporative bodies in Greece belong to this class and, far from shrinking in course of time, they develop profusely in all directions. The corporation of *ὀργεῶνες* founded by Aminos in Attika in the fourth century B. C.,³ the society founded by Epikteta in Thera⁴ (end of third century B. C.), the *θείσος* of Poseidonios,⁵ are remarkable instances of these religious corporations. The

¹ LIPSIUS, 770 ff.

² AR. *Ath. Const.* 52, 5.

³ KOERTE, *Mitteilungen des deutschen archäologischen Instituts*, XXI, 1896, referred to by F. POLAND, *Gesch. des gr. Vereins*.

⁴ C. I. G. 2448 (MICHEL, 1001).

⁵ DITT. *Syll.*³, III, 1044.

story of the Epikteta foundation is known in detail from a statute which has been preserved until our time. A citizen of Thera, Phoinix, bequeathed land and a certain capital to his widow, Epikteta, for the purpose of erecting a shrine to the memory of their deceased son, on condition that both he and the boy should be worshipped as heroes at that shrine together with the nine Muses. Epikteta added further funds of her own to the bequest, and founded a society of worshippers composed originally of the relatives with their wives and children, of husbands of married daughters who had inherited property in their own right, and of a few affiliated persons. In the act of foundation she provided that she herself and her daughter should enjoy the worship of the members of the corporation after their death. In this way the family of Phoinix and of Epikteta was raised to a semi-divine position as heroes to be worshipped at the shrine of the Muses.

In this case and in many analogous ones the super-individual element of corporative existence is provided not by abstraction from the rights and liabilities of the members, but by personification in the concrete form of hero-worship. Phoinix and Epikteta continue to live in their foundation, and their will remains active in the influence it exerts through the organization created in the original statute. The statute of Epikteta is significant in yet another direction: while it provides for the settlement of all important questions by votes of the majority, it forbids expressly any decision for dissolving the community.¹ This means, of course, that the founders intended their corporation to last for ever. And this is no singularity on the part of the Epikteta document. Poland has rightly drawn attention to the fact that the innumerable inscriptions treating of corporative arrangements never mention the possibility of dissolution, which occurs constantly in the statutes of modern companies of all kinds. As he

¹ ZIEBARTH thought that dissolution was possible in the abstract, but rendered difficult by the prohibition of any proposal to that effect. The matter is simpler, as $\pi\lambda|a|\nu$ has to be inserted between the two clauses. See F. POLAND, *Geschichte des griechischen Vereinswesens*, p. 275.

remarks, the Greeks who founded a shrine or a festival and a society connected with it never contemplated the possibility of its disappearance. It was to be alive for centuries (*αἰώνιον*) like the deity to which it was dedicated. It may be said that although moral persons were born of individual consent, they lived a real and concrete life for which the worship of a deity provided the spiritual tie. In this they were similar to the City which they imitated in their organization.

Organiza-
tion.

The link between the city and private associations was in Athens supplied by the tribal and local subdivisions, the phratries and the demes. They were officially recognized bodies of historical origin and at the same time they were considered in law to be a variety of the general class of associations. They were governed by assemblies and by elected magistrates—demarchs, phratriarchs, and subordinate employees. Apart from the *γένη* which represented the primordial nuclei of the tribal system of Attika, the component parts of the phratry were the *thiasoi*, or religious circles formed by what may be called the plebeian portion of the citizen class. They are called *ὄργεῶνες* on certain occasions, and there is no reason to doubt that the two designations—*ὄργεῶν* and *θιασώτης*—correspond to each other in the social terminology of Athens at least in the period between the sixth and the fourth centuries inclusive.¹ In these minor corporations government was also in the hands of assemblies of members and of elected magistrates. In connexion with the prominent part played by the religious element priests appear with a leading rôle. Altogether sacerdotal representatives of the organizations are more frequently mentioned in the inscriptions than purely civil or lay magistrates. The latter, however, are also mentioned as *ἀρχεραμισταί, ταμίαι*, &c. In societies formed by women or for the worship of a female deity like the Meter in Athens, or Artemis, priestesses assumed important functions and exercised considerable influence.²

¹ ZIEBARTH, 33 ff.; cf., however, POLAND, *op. cit.*, 13 ff.

² POLAND, 290 f.

By-laws and regulations were made by the general body of members as νόμοι (sometimes ψηφίσματα). The assembly which makes them and also elects the magistrates and priests is called ἀγορά, even when it is composed only of a dozen or a score of members. On entering the corporation new members have to swear an oath which binds them to be faithful to the community and to obey its decrees.¹ Discipline was maintained in the societies by conventional fines: every infringement of the by-laws and rules was to be followed by the payment of a certain sum according to an established tariff. In extreme cases the culprit was excluded from the community. The enforcement of the payment was sometimes brought about by private execution (πράξις, πράττειν) agreed upon in advance, but in the last resort the union might have recourse to the help of the city, and some of the ἐραρικαὶ δίκαι mentioned by Aristotle must have arisen from disputes as to fines and executive measures exercised by the corporations. Before matters came to this, however, influential unions tried cases in their own courts, as we may gather, for instance, from an interesting fragment informing us of a case in which the union of the Εἰκαδεῖς had tried certain members who had broken the oath of fidelity to the community by siding with its adversaries in a public suit and giving testimony against the corporation.² Apart from decisions of the tribunals of the city in the course of regular litigation, there was no interference of the State in the affairs of unions or corporations; as already indicated by Solon's laws, these affairs were considered as the results of voluntary agreement. A decree of the deme of Peiraieus has sometimes been cited in proof of the view that a deme could occasionally regulate and forbid the formation of new religious associations (θίασοι).³ The decree in question need not, however, be interpreted in this manner. It does not express a general prohibition,

¹ ZIEBARTH, *op. cit.*, 141 f.

² C. I. A. II, 609 (324-323 B. C.) ἐπειδὴ τινες ἐναντίον τῷ ὄρκῳ ὃν ὤμωσαν . . . διατελοῦσι πράττοντες καὶ λέγοντες κατὰ Εἰκαδέων ἐπὶ βλάβει τῶν κοινῶν κτλ.

³ C. I. A. II, 573 b. Cf. ZIEBARTH, *op. cit.*, 167 f.

but is directed against possible encroachments of private associations on the precincts of a temple belonging to the deme.

As members of the various combines we find in the earlier epoch (up to the third century B.C.) almost exclusively citizens. The opinion of Foucart,¹ one of the pioneers of the study of Greek associations, that the development started from the intrusion of foreign cults has been contested by Poland on the strength of an exhaustive study of the inscriptions. The oldest examples, like that of the Aminos *Orgeones*, testify indeed to religious motives in the formation of Colleges, but these motives are connected in Athens with the social reforms of the closing sixth century, leading to the recognition of new clusters of citizens gathered round traditional local cults similar to those of the *Lares compitales* in Rome.² The earliest appearances in Athens of a foreign cult and of a union connected with it is that of the Thracian goddess Bendis in the fifth century B.C. Later on foreigners appear chiefly as members of religious associations of a mystic character. Women are also mentioned only exceptionally in the older inscriptions; they appear naturally as members of cult-associations for the worship of female goddesses, but also in societies developing out of family relations. Slaves and freedmen appear very rarely in the early records; the most conspicuous instance is that of worshippers of *Men* which can be traced up to the third century. In *thiasoi* and *eranoi* with predominating citizen membership isolated slaves appear among the free, but these belong chiefly to the class of *δημόσιοι*, public slaves, who occupied an altogether privileged position, being independent of arbitrary control by private persons, and frequently holding important posts in the bureaucratic organization of the city. If I had to consider not only the classical, but also the Hellenistic period, I should have had to describe the remarkable growth of all sorts of combinations running across the established subdivisions and customary rules of city-organization. To mention only one point: in the

¹ *Des associations religieuses chez les Grecs*, 20 ff.

² POLAND, *op. cit.*, 515.

unions of the Pythagoreans and of Dionysiac artists the combines stretched wide across the frontiers of States and created international associations with authorities which could not be derived from any single city nor subjected to the law of any. But these developments fall, as Poland has rightly remarked, into a period when the city principle was giving way and the Greeks were seeking new channels for the satisfaction of their material and spiritual interests. The facts of this momentous process lie beyond the scope of the present work. They have been to a great extent collected and sifted in the excellent monographs of Ziebarth and Poland. Before concluding, I should, however, like to formulate a protest against Poland's general contention that the activity of associations was much restricted in the time before Alexander the Great.¹ It is true that we do not possess anything like the profusion of documentary material which confronts us for the third and subsequent centuries, but it is impossible, I think, to make inscriptions the exclusive test of the importance of a social development. The clear statement of the law of Solon, the references given by Aristotle, and the use of special procedure in trials of *δίκαι κοινωνικαί* and *ἐραδικαί* testify sufficiently that already in the sixth, fifth, and fourth centuries social combines were of common occurrence, and gave rise to a considerable amount of litigation. It is probable that in many cases these combines would have turned out under closer inspection to be more akin to the type of voluntary association (*societas*) than to that of the corporation. But the latter variety was certainly represented not only by tribal and local subdivisions (*phratries* and *demes*) but also by the various religious bodies known as *ὀργεῶνες* and *θίασοι*. Altogether, although the Hellenistic epoch contributed powerfully to the diffusion and development of unions and corporations, it did not introduce any new principle in the law as shaped by city jurisprudence. The Greek "moral and juridical person" had reflected and continued to reflect the religious or quasi-religious personification of the social side of human life.

¹ See e.g. HEROD. V, 57, 61, 66.

CHAPTER VII

THE LAW OF THE CONSTITUTION

1. *The Deliberative Functions of the People.*

Division
of func-
tions.

IN considering the fundamental principles of constitutional law in a democratic State, let us, to begin with, notice a rather important difference between our own current notions of the function of the State and those of the Greeks. Our usual way of treating the subject is to oppose three elements which since the time of Montesquieu have been accepted as the factors of political life, *viz.* the legislative, the judiciary, and the executive powers. For purposes of convenience this is a good working classification, but we must not lose sight of the fact that according to Greek democratic thought supreme power was not distributed in equal shares between these three functions. The Greeks regarded the *ἀρχαί*—the magistrates or the executive—as definite organs of the commonwealth, but they subordinated them to the people assembled for discussion and decision. Thus supreme power did not really present three aspects; it was twofold: (1) *τὸ βουλευόμενον*, the deliberative aspect, and (2) *τὸ δικάζον*, the judicial.¹ One may go further and say that even this twofold division is made only for practical purposes; it is a division of functions, not of powers. The latter would imply an opposition of forces, whereas a division of functions only means that the same body acts sometimes in one way and for certain purposes, and sometimes in another way and for other purposes; no checks are intended by such a division.

This observation supplies the clue to the organization of

¹ Cf. AR. Pol. VI (IV), 14, 1298 a ἐν μὲν τί τὸ βουλευόμενον περὶ τῶν κοινῶν, δεύτερον δὲ τὸ περὶ τὰς ἀρχάς, . . . τρίτον δὲ τί τὸ δικάζον. κύριον δ' ἐστὶ τὸ βουλευόμενον περὶ πολέμου καὶ εἰρήνης καὶ συμμαχίας καὶ διαλύσεως, καὶ περὶ νόμων, καὶ περὶ θανάτου καὶ φυγῆς καὶ δημεύσεως, καὶ παρὶ ἀρχῶν αἰρέσεως καὶ τῶν εὐθυνῶν. Cf. VIII (VI), 1, § 1, 1316 b. Cf. HILDENBRAND, *Gesch. der Rechtsphil.* I, 464.

power in a Greek democratic State. Let us see how the deliberative function materialized at Athens for purposes of legislation. In the passage of the *Politics* referred to above¹ (1298 a) legislation is ascribed to the deliberative element (i. e. to the Assembly in conjunction with the Council). It is usually supposed that legislation belongs to the Heliaea, the *δικασταί*. This is true, however, only of one period, and of this only with certain reservations; the right of the dikasts was not really judicial in this case, though it assumed the forms of judicial procedure.

Before examining this question in detail, let us look at the various subjects which may come under the head of legislation. We find three groups: legal rules and enactments are described as *θεσμοί, νόμοι*, and *ψηφίσματα*. The difference between *θεσμός* and *νόμος* is one of epoch; ² *θεσμός* belongs to the archaic period and does not occur in the age of Perikles or that of Demosthenes; Drakon was a *θεσμοθέτης*. The distinction is connected with the fact that *θεσμός* is a statement or declaration of customary law; customary law is *laid down*. The term was preserved in the title of the six minor archons, the *θεσμοθέται*. Their old legislative function gradually disappeared, and gave place to the judicial, but they were originally magistrates formulating law as well as enforcing it.

Classifica-
tions of
enact-
ments.

Two forms persisted in the classical period, *νόμος* and *ψήφισμα*. This is a fundamental division not difficult to understand, as it is an equivalent to our own opposition between statute and decree. A statutory law is a general rule, and this is just what Aristotle says about *νόμος*—that it deals with *τὰ καθόλου*. A decree (*ψήφισμα*) is a rule or order laid down for a particular occasion, and may apply to definite persons or objects. This distinction seems indisputable: it is clearly indicated by Aristotle in the well-known passage in the fourth book of the *Politics* where he

¹ Page foregoing.

² Cf. above, pp. 74 f. Prof. J. A. Smith calls my attention to the fact that in Solon's Elegy quoted by Aristotle in *Ath. Const.* c. 12, ll. 42-47, the terms *νόμος* and *θεσμός* are used one after the other, and the latter refers seemingly to rules of procedure. It would be hardly appropriate, however, to infer from this that *νόμος* stands in that passage for substantive law. It is opposed to *βία*, and points to law in contrast with violence or oppression.

is contrasting the legislation of normal and of degenerate democracies.¹ A democracy, he says, which forms general rules is normal and healthy; but there may come a time when a democracy ceases to take itself seriously,—trifles with the situation and legislates by decree. In this case a democracy is like a tyranny in that it acts arbitrarily, and its decrees (*ψηφίσματα*) are like the ukases (*ἐπιτάγματα*) of a despot. Aristotle refers to the same distinction in the *Ethics*.²

Objection has been raised to this general description: some modern writers³ think that it is impossible to trace this opposition in the text; the distinction between the two kinds is declared to be uncertain and fluid. We have a number of laws of the fifth century, passed (as these writers suppose) by *ψήφισμα*, e. g. the law of Ephialtes abolishing the rights of the Areiopagos was passed by the Assembly as a decree. The law establishing ostracism is regarded as the outcome of a decree and not of the ordinary procedure of legislation. But these instances are not convincing: we do not know in detail how these laws were passed, and if we did we might find that certain legislative forms were observed which would range them in the group of statutes. The decisive consideration for us in this matter is that it would be strange if a writer of the standing and qualifications of Aristotle should have fallen into a fundamental misconception. We may grant that he puts it down too dogmatically and does not allow sufficiently for the overlapping of boundaries and for intermediate links. The distinction was not so clearly realized in earlier times as it was in the fourth century, when political thought had been sharpened by analysis, but the general opposition between law and decree is a matter of common reasoning; and, what is more, the complicated process

¹ *Pol.* VI (IV), 4, 1292 a 15 ὁ δ' οὖν τοιοῦτος δῆμος, ἅτε μονάρχος ὢν, ζητεῖ μοναρχεῖν διὰ τὸ μὴ ἄρχεσθαι ὑπὸ νόμου, καὶ γίνεται δεσποτικός, . . . καὶ ἔστιν ὁ τοιοῦτος δῆμος ἀνάλογον τῶν μοναρχιῶν τῇ τυραννίδι. διὸ καὶ τὸ ἦθος τὸ αὐτὸ, καὶ ἄμφω δεσποτικὰ τῶν βελτιόνων, καὶ τὰ ψηφίσματα ὡσπερ ἐκεῖ τὰ ἐπιτάγματα.

² *Eth. Nik.* V, x, 1137 b ὁ μὲν νόμος καθόλου πᾶς.

³ B. KEIL in GERCKE und NORDEN, *Einleitung*, p. 351 Cf. SWOBODA in K. F. HERMANN'S *Lehrbuch der griechischen Antiquitäten*, III Th. (6te Aufl.), 122 f.

of *νομοθεσία* was certainly not introduced at random—it was a deliberate attempt on the part of the leaders of democracy to prevent hasty and contradictory legislation. If any corroboration were needed of Aristotle's remark that in bad democracies there was a tendency to confuse the two kinds of rule, it might be found in Demosthenes' speech against Leptines, where the orator says that the Athenians mixed up laws and decrees, and ceased to maintain even the general principle that laws should not be contradictory.¹

A second rule to be noticed in this connexion is the requirement that no law should be made concerning single persons; if *νόμος* means a general rule, *νόμος ἐπ' ἀνδρί* is a contradiction in terms. But there were cases when the people had to exercise power in order to confer a privilege. Thus it is possible to make exceptionally a *ψηφισμα ἐπ' ἀνδρί*; the matter was, however, enacted in a manner different from ordinary legislation. A special assembly of not less than 6,000 was required, as in the case of ostracism, which was another special form of *νόμος ἐπ' ἀνδρί*. This constituted a guarantee against misuse.

In two other typical cases privileges may be conceded: for grants of citizenship the same procedure was employed, and again in the case where the people decided to liberate an intending legislator from a prohibition to legislate on some matter: this prohibition was added for the purpose of keeping law immutable. If changes, however, were considered necessary, an immunity (*ἄδεια*) was asked for and often granted.

How was legislation carried out, and what guarantee was there that the established views would be maintained in practice? What was done in Athens to keep the sovereign people within the bounds of legality? There being no appeal to any court of higher instance, certain forms were devised with a view of restricting its action.

The people was deprived of the initiative² in legislation;

¹ DEMOSTHENES, XX, 92, *ψηφισμάτων δ' οὐδ' ὀτιοῦν διαφέρουσιν οἱ νόμοι ἀλλὰ νεώτεροι οἱ νόμοι καθ' οὓς τὰ ψηφίσματα δεῖ γράφεσθαι, τῶν ψηφισμάτων αὐτῶν ἡμῖν εἰσίν,*

² HERMANN SWOBODA, III, 116.

it was supreme as to the decision, but impotent for initiation. For the latter purpose a preliminary draft (*προβούλευμα*) had to be received. This was necessary, indeed, because a large assembly had to start discussion from something definite. No law could be proposed without the *προβούλευμα* of the Council; no one but a citizen could attend the meeting; no one but a citizen could speak in the Assembly; and only a limited number of qualified persons could address it; only responsible men had the right *agere cum populo*. The Council (*βουλή*) must draw up the proposal, the generals (*στρατηγοί*) could summon an Assembly in addition to the ordinary ones which were fixed. Thus there could be no surprises.¹

There is an additional point to be considered: when the people later on began to chafe at these restrictions, it found ways for circumventing them. The power of proposing amendment to bills was very wide; an amendment might be quite opposed to the proposal made. We have an instance of this recorded in Plutarch's life of Perikles²; Perikles was attacked by his political enemies, who required him to produce his accounts. The original demand was drawn up by one Drakontides in a *προβούλευμα* giving Perikles the opportunity to vindicate his conduct. The proposal was that he should present his accounts to the Prytaneis (*Πρυτανεῖς*), and they should give judgement on oath. Hagnon entirely altered the proposal by introducing a general charge: Perikles should be judged by the usual tribunal, and the accusation should be for embezzlement and bribery, or for illegal practices. Thus the amendment went directly against the sense of the original *προβούλευμα*; material changes of the original proposals were, altogether, by no means an uncommon occurrence.³ The result was greater elasticity and a good deal of confusion.

¹ AR. *Ath. Const.* 44, 45.

² PLUTARCH, *Perikles*, 32 "Αγων δὲ τοῦτο μὲν ἀφείλε τοῦ ψηφίσματος, κρίνεσθαι δὲ τὴν δίκην ἔγραψεν ἐν δικασταῖς χιλίοις καὶ πεντακοσίοις, εἴτε κλοπῆς καὶ δάρων εἴτ' ἀδικίου βουλοῖτό τις ὀνομάζειν τὴν δίωξιν.

³ Cf. DITT. *Syll.* I³. 64, ll. 70 ff. 'Ἀρχέστρατος εἶπε· τὰ μὲν ἄλλα καθάπερ 'Αντικλῆς· τὰς δὲ εὐθύνas Χαλκιδεῦσι κατὰ σφῶν αὐτῶν ἔναί ἐν Χαλκίδι καθάπερ 'Αθῆνεσιν 'Αθηναίοις, πλὴν φυγῆς καὶ θανάτου καὶ ἀτιμίας· περὶ δὲ τοῦτον ἔφεσιν ἔναί 'Αθῆναζε ἐς τὴν ἐλαιάν τὴν τῶν θεσμοθετῶν κατὰ τὸ ψέφισμα τῷ δήμῳ. περὶ δὲ φυλακῆς Εὐβοίας τὸς στρατεγὸς ἐπιμελεῖσθαι ἥος ἂν δύνονται ἄριστα, ἥπος ἂν ἔχει ἥος βέλτιστα 'Αθηναίοις. Cf. *ibid.* 116, ll. 33 ff.

Any orator who made a proposal to the People was responsible for the success or failure of the proposed line of action. The People might act foolishly under stress of passion, and afterwards repent and vent their rage on the orator. This happened, for instance, after the battle of Arginusae: the People regretted their action in condemning the generals, and passed a decree that those who had deceived the Demos should be subjected to a prejudicial trial (*προβολή*), and then should be tried before the Courts.¹ They were accused and condemned, and one of their number, Kallixenos, who fled, but afterwards returned to Athens, eventually died of starvation. Thus the People might charge those whose proposals it had accepted, and refuse to assume the responsibility for its own decisions. Similarly in the case of the *γραφὴ παρανόμων*, impeachment for illegal proposals, if a mistake was made it was the proposer who was deemed guilty, not the People who had passed the law. Under normal circumstances strict rules were followed; in order to avoid surprises the various assemblies of the Prytanies had to treat fixed subjects: e.g. the first assembly of the first Prytany had to hold the *ἐπιχειροτονία τῶν νόμων*, the first of the sixth had to deal with the responsibility of officers, etc.

The process of legislation assumed about 450 B.C. a very peculiar and intricate character, presenting a great contrast to our own system.² A person wishing to introduce a new law had first to obtain permission to submit a bill in the first Assembly of the first Prytany of the year. If this were approved, the proposal took a more definite form; certain of the old laws were criticized as obsolete or otherwise defective, and the bill embodying the proposed changes was posted up in the market-place. Then followed a discussion in the fourth Assembly of the first Prytany as to whether definite schemes should be presented to the Courts. If the decision was in the affirmative, advocates (*συνήγοροι*) were appointed to defend the old law against the accusations brought forward by the author of the new project.

¹ XEN. *Hell.* I, 7. See below, p. 151.

² SCHOEMANN-LIPSIUS, I, pp. 415 ff.

A judicial commission of *νομοθέται* had to decide whether the old law was to be abrogated; all existing measures contradictory of the proposed new law had to be annulled before the latter could be passed.¹

In all this the principle is clear that particulars of legislation should not be decided on in the Ekklesia or general Assembly, but in a Heliastic Court. *Decrees* (*ψηφίσματα*) were passed both by the Council and by the Assembly, but a law (*νόμος*) could only be introduced in the Assembly; its actual enactment was in the hands of the *νομοθέται*, who formed a Heliastic Commission. This latter thus acted as a kind of Second Chamber, but was not, as modern Second Chambers are, mainly conservative in its action; it must be added that the discussion as to the new law is not presented with the same clearness of details as the abrogation of the old one.

In the speech of Demosthenes against Timokrates the extracts purporting to be taken from actual laws may not be literally genuine, but there can be no doubt that in substance they correspond to facts. Indirectly the process is referred to in inscriptions, which corroborate the evidence from speeches. For example, there is an inscription² of the middle of the fourth century containing a decree in favour of one Peisitheides. After the statement of the usual privileges granted to this man come the words: "That the treasurer of the Demos should pay to Peisitheides a drachma a day, and that this should be authorized by an ordinance of the *νομοθέται* that the *πρόεδροι* in office at the time and the chairman (*ἐπιστάτης*) should draw up a special enactment that the *ἀποδέκται* should assign this money to the treasurer of the Demos year by year." Thus the Commission acted in regard to the passing of a financial measure.

¹ DEM. XXIV, § 33 *ἐναντίον δὲ νόμον μὴ ἐξείναι τιθέναι τῶν νόμων τῶν κειμένων μηδεμί.* εἴαν δέ τις λύσας τινὰ τῶν νόμων τῶν κειμένων ἕτερον ἀντιθῆ μὴ ἐπιτήδειον τῷ δήμῳ τῷ Ἀθηναίων ἢ ἐναντίον τῶν κειμένων τῶν, τὰς γραφὰς εἶναι κατ' αὐτοῦ κατὰ τὸν νόμον ὃς κείται, εἴαν τις μὴ ἐπιτήδειον θῆ νόμον. Cf. *Ath. Const.* c. 59.

² DITT. *Syll.* I, 226, 1, 37 τὸν ταμίαν τοῦ δήμου τὸν αἰεὶ ταμεύοντα διδόναι Πεισιθειδῆι δραχμὴν τῆς ἡμέρας ἐκ τῶν κατὰ ψηφίσματα ἀναλισκομένων τῷ δήμῳ· ἐν δὲ τοῖς νομοθέταις τοὺς προέδρους οἱ ἂν προεδρεύωσιν καὶ τὸν ἐπιστάτην προσνομοθετῆσαι τὸ ἀργύριον τοῦτο μερίζειν τοὺς ἀποδέκτας τῷ ταμίᾳ τοῦ δήμου εἰς τὸν ἐνιαυτὸν ἕκαστον.

The law is not one of those passed as a general rule and valid as long as it is not abrogated; but it is clear that these financial measures had to pass the scrutiny of the judicial commission in the same way as actual laws. In this case the *νομοθέται* acted as a Court with yearly legislative powers.

The *νομοθέται* were a judicial commission consisting of six hundred members selected from among the sworn judges, and this, no doubt, was one reason why the elaboration of laws was entrusted to them rather than to the Assembly; since the latter body took no oath it was regarded as less responsible. The oath of the *νομοθέται* made the process of legislation more solemn, and provided an extra safeguard against hasty action.

Another important difference consisted in the fact that judges were mute, while members of the Assembly were free to discuss and to vary proposals. There was always a great risk of confused and contradictory drafting of decrees, while the adversaries pitted against each other before a Court were bound to formulate and to argue on definite issues, decision resting meanwhile with the *δικασταί*.

By the side of ordinary legislation there were occasions when general reforms or revisions were carried out by special processes resembling the Roman method of legislation by means of a *dictator rei publicae constituendae*. Solon was such a dictatorial legislator; so was Kleisthenes and, probably, Ephialtes. It was recognized on such occasions that it was impossible to carry out sweeping reforms through the entanglements of ordinary legislative procedure. Confirmation of the People was expressed by the approval of the whole complex of laws and by an oath to abide by them for ever, or for a certain stated period. The revisions of laws after the fall of the Four Hundred and after the pacification of 403 B.C. must have been carried out by similar methods.

Some light on these methods is shed indirectly by facts which took place outside Athens. Under the Makedonian kings wholesale legislative reorganization was not uncommon; Philip and Alexander insisted, for instance, on a return to democratic systems in the Greek cities on the

islands and on the coasts of Asia Minor. We have an inscription recording an order of Alexander the Great to the city of Chios.¹ The decree enacts that democracy is to be restored; legislators are to be elected to put down in writing the laws of a new Code. Antigonos decreed about 303 B. C. that the cities of Teos and Lebedos should be joined into one commonwealth by *synoikismos*, and that a commission of *νομογράφοι* should draw up laws for that commonwealth, any differences between the legislators being referred for settlement to King Antigonos. In the interval between the passing of the decree and the completion of the task of legislation the two cities agreed to be ruled by the laws of the neighbouring city of Kos.²

Νομοφυ-
λακία.

A characteristic supplement to legislative functions at Athens was provided by the *guardianship* or preservation of the laws. In modern systems we do not make a definite opposition between conservation of laws and the general functions of legislation. In English law every judicial decision aims at preserving law as well as deciding a particular case. In other systems this opposition is more clearly marked: e. g. in the United States discussion in the Supreme Court starts from the point of view of private litigants, although indirectly it may result in testing the constitutional validity of a law.

In Athens there was no consolidated constitution; but as laws were presumed to be passed in a solemn and regular manner they could be appealed to against a new law on the ground of infringement. The development of the guardianship of law (*νομοφυλακία*) is so characteristic that it must be noticed, if only briefly. It passed through three stages:

¹ DITT. *Syll*³. I, 283, 11, 4 ff. πολίτευμα δὲ εἶναι ἐν Χίῳ δῆμον αἰρεθῆναι δὲ νομογράφους, οἵτινες γράψουσι καὶ διορθώσουσι τοὺς νόμους, ὅπως μὴδὲν ἐναντίον ἢ τῆ δημοκρατίᾳ μὴδὲ τῆ τῶν φυγιάδων καθόδῳ. τὰ δὲ διορθωθέντα ἢ γραφέντα ἐπαναφέρεσθαι πρὸς Ἀλέξανδρον.

² *Ibid.*, 344, § 3 εἰς δὲ τὸ λοιπὸν καὶ διδόναι καὶ λαμβάνειν δίκας κατὰ νόμους οὓς ἂν ὑπολαμβάνοιτε ἴσους ἀμφοτέροις εἶναι. ἀποδείξαι δὲ ἑκατέρους νομογράφους τρεῖς . . . οἱ δὲ αἰρεθέντες ὁμοσάντων γράφειν νόμους οὓς ἂν νομίσωσιν βελτίστους εἶναι καὶ συνοίσειν τῆ πόλει . . . τῶν δὲ εἰσενεχθέντων ὅσα μὲν ἂν ἐξ ὁμολογουμένων ὁ δῆμος ἐπικυρώσῃ, χρᾶσθαι τούτοις, ὅσα δὲ ἀντιλεγόμενα ἢ, ἀναπεμφθῆναι πρὸς ἡμᾶς, ὅπως ἢ αὐτοὶ ἐπικρίνωμεν ἢ πόλιν ἀποδείξωμεν τὴν ἐπικρινοῦσαν . . . συνομολογησάντων δὲ ἀμφοτέρων ὥστε τοῖς Κώϊων νόμοις χρῆσθαι, ἐπικεκρίκαμεν, τοὺς δὲ Κώϊους παρεκάλεσαμεν πρὸς τοὺς νόμους ὅπως δώσωσιν ὑμῖν ἐγγράφασθαι.

at first it was in the hands of the Areiopagos; on this we have definite information in the *Athenian Constitution*.¹ Speaking of the laws of Drakon Aristotle says that the Council of the Areiopagos was the guardian of the laws. In describing Solon's constitution Aristotle repeats, that Solon set the Areiopagos to guard the laws as it had done before.² This accounts, according to Aristotle, for the importance of the Areiopagos in political affairs down to the time of Ephialtes.

The Areiopagos was an essentially conservative institution, the stronghold of the *πάτριος πολιτεία*. Developed democracy could not leave such important powers in its hands: therefore Ephialtes took them away; but in order not to destroy the function of "guardianship of law" a substitute had to be introduced. In the second stage in the history of *νομοφυλακία*, according to a fragment of Philochoros,³ *νομοφύλακες* were instituted with the right to watch over proceedings in the Council and in the Assembly, where seats were assigned to them beside the Presidents. This statement is definite, yet no instance is recorded of interference by these supervisors in the course of Athenian legislation. So much material has come down to us in the speeches of the orators and in the notices of scholiasts and lexicographers that the omission cannot be accidental. The fact was that the arrangement was not in harmony with the general trend of Athenian politics and was in practice superseded by the "accusation for illegality" (*γραφὴ παρανόμων*). The third period in the history of the *νομοφυλακία* is represented by its revival towards the end of the fourth century; at the "restoration" of Athenian democracy under Demetrios of Phaleron an attempt was made to re-establish it on Ephialtian lines.

¹ *Ath. Const.* c. 4 ἡ δὲ βουλὴ ἢ ἐξ Ἀρείου πάγου φύλαξ ἦν τῶν νόμων καὶ διετῆρει τὰς ἀρχὰς ὅπως κατὰ τοὺς νόμους ἄρχωσιν. ἐξῆν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλήν εἰσαγγέλλειν ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον.

² *Ibid.*, c. 8 τὴν δὲ τῶν Ἀρεοπαγιτῶν (βουλήν) ἔταξεν ἐπὶ τὸ νομοφυλακεῖν, ὥσπερ ὑπῆρχεν καὶ πρότερον ἐπίσκοπος οὖσα τῆς πολιτείας. Cf. WILAMOWITZ-MOELLENDORFF, *Aristoteles und Athen*, II, p. 187 f.

³ *Fragm. Hist. Gr.* (Muller), I, Fr. 141 b τὰς δὲ ἀρχὰς ἠνάγκαζον τοῖς νόμοις χρῆσθαι, καὶ ἐν τῇ ἐκκλησίᾳ καὶ ἐν τῇ βουλῇ μετὰ τῶν προέδρων ἐκάθητο κωλύοντες τὰ ἀσύμφορα τῇ πόλει πράττειν.

Γραφή
παρανόμων.

The ordinary course was to allow any one to bring an accusation for infringement of legal rules,¹ neglecting forms of procedure or some regulation bearing on the legislative process (*νομοθεσία*). That there was constant litigation of this kind is shown by the speeches of the orators. Aischines in his speech against Ktesiphon has a notable passage on this point.² Aristophon had prided himself on having been seventy-five times accused by *γραφή παρανόμων*; Aischines says that it is a greater claim to fame to be able to say, as Kephalos did, that no one living had proposed so many decrees as he had, and that without ever having been challenged by *γραφή παρανόμων*. The most important speeches dealing with this process are those of Demosthenes against Aristokrates and Timokrates; that against Leptines is also noteworthy as showing that even after a year had elapsed a person could be attacked, though not legally penalized. In Demosthenes' speech on the *Crown* and in Aischines' speech against Ktesiphon, to which the former oration was the reply, we notice the worst side of the practice, its use as a political weapon for personal motives.³ In the speeches mentioned above, however, there is more than personal hostility: Demosthenes made a genuine attempt to underline the principles which ought to be considered. In the speech against Aristokrates the facts were that Aristokrates had proposed a special measure prompted by gratitude to the Thracian general Charidemos: one of the clauses provided that if any one attempted to murder or actually murdered Charidemos he should be seized and put to death without trial. Demosthenes attacks Aristokrates on the ground that such a procedure would amount to a denial of judicial discussion, and that it would be emphatically a case of privilege for a single person, an illegal *νόμος ἐπ' ἀνδρί*. As we have seen before, there was only one way of legislating in a case of this kind: the proposal

Rule of
law.

¹ DEM. XXIV. 36 βουλόμενος φύλακας ὑμᾶς τῶν νόμων καταστήσαι.

² III, §§ 193, 194.

³ Cf. also HYPEREIDES, II (IV), 17. In this case the proposed measure was not in itself illegal, though open to criticism, and the use of the γρ. παρανόμων was an abuse of the purpose for which this procedure was intended.

had to be carried in a special assembly with 6,000 citizens present. This was, of course, an exceedingly high quorum, as there were only 20,000 citizens on the ordinary roll; many of these could not be present on account of various duties both public and private, including military service at home and abroad:¹ but the difficulty of securing this large attendance was just the reason why it was required. We know that in the case of ostracism 6,000 had to vote in the Assembly, and though in the case of privilege the voters would not be ekklesiasts merely, but heliasts, there is some evidence to show that the number could be used for the legislative purpose, that is, the proposal could be put before them as *δικασταί*.² In any case it is clear that the Athenians had a rule that the ordinary legislative process could not be employed to proclaim either privilege or proscription of an individual.

Another point, illustrated in the speech against Timokrates, is the prohibition of *ex post facto* legislation. In this case Timokrates had contrived to carry a law which defied legislative guarantees. Three Athenian ambassadors were on their way to Halikarnassos when the ship on which they were sailing captured an Egyptian vessel. Egypt being at war with the Athenians, the vessel was declared a prize. The money thus acquired was entrusted to the ambassadors to be paid into the treasury; but they kept it for a long time. They were accused and condemned to repay the money, and not only the actual sum but double the amount. Timokrates, coming to their assistance, brought in a bill by which persons who were debtors of the State and subject to imprisonment in default of payment should be exempt from imprisonment if they could produce three sureties, and should then be allowed to pay the debt by instalments; up to the ninth Prytany of the year simple payment of the money should satisfy the claim. It was not difficult to show that this proposal was made for the benefit of the three ambassadors, and, as being contrived *post factum*, was illegal.

This shows that the Greeks recognized the principle

¹ FRAENKEL, *Die attischen Geschworenengerichte*, 15 f.

² See above, p. 84, App. to Ch. IV.

clearly stated in the constitution of the United States of America that no law should be retroactive, that no person ought to be affected by a law which was not in force when his case was decided.

2. *Control of the Administration.*

Position
of officials.

The next point with which we have to deal is the treatment of executive officials. In the sixth book of the *Politics* Aristotle dwells on the general attitude of the Athenian Demos as regards officers, taking Athens as an example of extreme democracy.¹ There are two main directing lines: the first principle is to make it possible for every citizen in turn to become an official or magistrate.² Offices were therefore arranged in colleges of ten, and iteration was prohibited as a rule except in the case of the *στρατηγία*, where such a prohibition was deemed impossible because commanders must have technical knowledge and recognized talent. Thus Perikles held office for fifteen years as *στρατηγὸς αὐτοκράτωρ*. All the other officials were chosen for a period limited to one year, or for those of lower grade—curators and delegates—to six or even three months. Thus access to honorary offices (*τιμαί*) was open to very many people.

The second principle is that election is by lot, except, as before, in the case of the generals. This is a direct consequence of the number of claims to a share in power. Aristotle's remarks in the *Ethics* on the distribution of advantages³ show that *τιμαί* are thought of as a benefit or boon to which every one has a claim, and for which every normal citizen is deemed fit. It is obvious that the use of the lot is not the best way to select magistrates; and the drawing of lots was supplemented by a *δοκιμασία*, a test of fitness; every candidate must have passed this scrutiny, in which he had to defend himself eventually against accusations and criticism. In the case of the generals it was

¹ See WILAMOWITZ-MOELLENDORFF, *Aristoteles und Athen*, I. 217 f.

² *Pol.* VIII (VI), 2, 1317 b ὑπόθεσις μὲν οὖν τῆς δημοκρατικῆς πολιτείας ἑλευθερία . . . ἑλευθερίας δε ἐν μὲν τὸ ἐν μέρει ἄρχεισθαι καὶ ἄρχειν.

³ *Eth. Nik.* V, ii and iii, 1130 b 30, 1131 a 25. See above, pp. 52 f.

still required that they should be landowners and fathers of families.

There are three speeches of Lysias written in cases of *δοκιμασία*; in two of them he defended persons attacked, and in the third he accused an archon-elect, named Evander. In these speeches the main object was to scrutinize the conduct of candidates during the rule of the Thirty. Lysias tried to prove that his clients had not taken an active part in the crimes of the Thirty, and on the contrary that Evander did take part in an execution ordered by the Thirty. The scrutiny dealt with no definite offence, no single act or fact, but bore on the whole tenor of a man's conduct and involved a general review of his career. Even in the case of Evander no special crime is alleged, and Lysias only censures his general conduct. Such a scrutiny counteracted to some extent the influence of chance in the lot; it provided a possibility of revision. The candidate's personal capacity for the post he was to hold was not, however, considered; this was not necessary, since each individual's part was reduced to a minimum so that he could not personally do much harm or much good.

Another point to notice is the processes *εὔθυναί* and *ἐπιχειροτονία*.¹ Every official when selected, though he had certain prerogatives, knew that he had to stand a strict examination not only by *εὔθυναί* at the end of his term of office, but even in the course of his tenure by *ἐπιχειροτονία*. The *εὔθυναί* had two aspects: receipts must be presented and expenditure justified before the auditors (*λογισταί*): but besides this there was an examination before the *εὔθυνος*, and in the case of high offices before the Council and the Judicial Courts.¹ All sorts of accusations could be brought up here. The *ἐπιχειροτονία* went further than this: at any moment during one of the regular Assemblies (*κυρία ἐκκλησία*, the first of each prytany), an official could be suspended and brought up for examination. The generals were liable to this as well as other officials (as we learn from the *Athenian Constitution*), the question being whether it seemed to the People that the magistrate in

¹ Cf. HERMANN-SWOBODA, *Griech. Antiqu.* III, 152 f.

question was performing his duties properly.¹ Much confusion might be caused in this way. We hear e.g. of the *θεσμοθέται* being suspended on a certain occasion.²

The Five
Hundred.

Another point comes for consideration here: the wish of the Demos not to leave delegates in full possession of the powers given to them, but to intervene directly in administration. The Assembly being too numerous for that purpose the Council of Five Hundred was charged with the supervision of the current administration; it came therefore to occupy an anomalous position. In one sense it was an *ἀρχή*: the members were chosen by lot, and had to submit to scrutiny (*δοκιμασία*). Single members could be subjected to *εὔθυναί*, while the conduct of the Council as a body could be approved or censured by indirect means. At the end of the year the usual practice was to propose that a crown should be offered to the Council in acknowledgement of its good services. Demosthenes in his speech against Androtion accused the latter of bringing his proposal without the necessary *προβούλευμα*. As the proposal concerned the Council itself, it was somewhat difficult for that body to make the ordinary draft. It may be inferred from this speech, especially from §§ 33-38, that the gift of the crown was regarded as covering the actions of the Council in all directions. Certain members wished by means of Androtion's proposal to shield themselves and escape responsibility for their actions. The Council, being a permanent delegacy of the people, came to be the most important administrative organ of the State; through the system of prytanies it was always in session. It controlled the democratic machinery of finance, according to which no money was kept for more than a couple of days in the central office, but all was distributed as soon as possible for definite purposes (e.g. the *θεωρικόν*). It was the business of the Council to see that there was no large amount of money accumulating in the hands of the clerks of the treasury. The main payments were made in the ninth prytany (20th of Thargelion).

¹ AR. *Ath. Const.* 61 ἐπιχειροτομία δ' αὐτῶν (sc. τῶν στρατηγῶν) ἐστὶ κατὰ τὴν πρυτανεῖαν ἐκάστην, εἰ δοκοῦσιν καλῶς ἄρχειν.

² DEM. LVIII, 27 f.

The question also arises: Is the Council to be considered *only* as an administrative organ, or as a kind of "Upper House" taking a share in the sovereign power of Athens? When it was created by Solon the latter was, no doubt, intended. This aspect is manifested e.g. in the form of the decrees, ἔδοξε τῇ βουλῇ καὶ τῷ δήμῳ; and in the fact that the Council prepared the *προβουλεύματα*. In its executive capacity the Demos could not do without delegation of some kind; a definite framework for activity was required, and in this respect the Council acted as a kind of standing Committee of the Assembly. In the history of the Council, however, as in other matters, we see a process of gradual encroachment on the part of the democratic Assembly which represented the people most directly.

3. *Judicial Functions of the People.*

There is a necessary separation of functions between governmental and judicial action, and while the Greeks laid chief stress as regards the former on *deliberation*, the attribute of *decision* (κρίνειν) was naturally prominent in the latter. However, the separation of functions could not be carried out consistently, and in Athens, at any rate, an attempt was made to combine in the highest instance—that of the Heliaea—the function of the People in judgement with that of the People as a deliberative body. In some of the extant speeches the pleaders address the juries as citizens of Athens, not technically as *δικασταί*, and it is clearly realized that the main difference does not consist in the fact that the judicial body forms a special institution, but in the fact that citizens of mature age are acting under oath. Now the recognition of a unity of political and judicial functions led of itself to the very democratic constitution of the tribunals. It is hardly necessary to repeat that we have to deal in this case with bodies of 201, 401, sometimes even 1,001 and 1,501, in session. The drawbacks of such a constitution of the judicature are obvious. Aristotle treats of them specifically in two or three instances in his *Politics*. The most important passage is in the second

Demo-
cratic
tribunals.

book,¹ where, after making a statement as to the proposals of Hippodamos of Miletos for an improved arrangement of democratic tribunals, Aristotle turns to the actual practice of such tribunals.

Aristotle's line of argument in this case seems reasonable, and one cannot but agree with him that the introduction of variety of opinion would have led in such large democratic tribunals to inextricable confusion. The other objection which Aristotle meets in another passage² bears on the wisdom of allowing large crowds to pronounce sentences in judicial disputes. Here again Aristotle presents an apology on the ground that although each single member of such a crowd may not be very competent or wise, there is reason to suppose that many acting together are usually capable of finding out a common-sense solution of difficulties. In any case the system provides against corruption, as a large quantity of water is more free from any taint of corruption than a small quantity of the liquid. These characteristic explanations and apologies must be accepted as the ultimate result of doubts and controversies on the part of thinkers, and there is a good deal of sound common sense about them.

From our own experience of the speeches as preserved in the various collections of the works of Demosthenes, Lysias, Isaios, &c. we may come to the conclusion that on the one hand the Athenian jurors were very apt to be caught by sophistical arguments and impressionist suggestions, so that from the point of view of strict application of the law the system left very much to be desired. But on the other hand it is clear that, at any rate during the best period of democratic Athens, there was good reason to trust the jurors in their general estimates of the rights and wrongs of a case. The analysis of νόμοι may have been often faulty, but the exercise of equity (ἐπιείκεια) on the part of jurors was aimed at as the principal guarantee that the legal process would follow the line of public opinion, the standard of justice being much influenced, of course, by the demo-

¹ *Pol.* II, v, 3, 1268 a. See above, p. 49.

² *Ibid.* III, 15, 1286 a 30 ff. Cf. *Ath. Const.* c. 41, § 2.

cratic conception of the superior right of the community at large. After all it may be worth noting that even in Rome, where of course the professional point of view was much more prominent and led to remarkable results, the notion as to the part played by the *judex* was clearly governed by the assumption that a man representing the lay element of the community must be guided by a general appreciation of the merits of a case, and cannot be fettered by very strict rules as to evidence and as to the value of the arguments produced by pleaders.¹

In any case, in order to work such a system with tolerable results, it had to be surrounded with certain guarantees and technical restrictions. The principal way out of the difficulty was sought in a kind of dualism between the preliminary steps leading to a discussion and possibly conciliation, and the ultimate stage of adjudication. In Rome this dualism found an expression in the clearly-cut formulary arrangement by which the procedure *in jure* appertaining to the magistrate and guided by juriconsults was quite distinct from the procedure *in judicio* which culminated in the verdict of the *judex*. It would be misleading to look for an exact parallel to this dualism in Greek procedure. Nevertheless one must reckon seriously with the preliminary action of the magistrate of Athens or other democratic cities in directing the trial along certain specific lines. The *ἀνάκρισις* of the magistrate who had to preside in the *δικαστήριον*, or the arbitration of the *δαιτητής*, was evidently a very important part of the process, although we do not hear much about it. This preparatory action is generally relegated to the background by the display of forensic eloquence in the speeches; nevertheless one may sometimes perceive certain vestiges of it in the trials. In the *διαδικασία* as to the succession of Hagnias, for instance, it is evident from the argument of the parties that the archon who instructed the case, and who presided at the trial, had settled the question as to the persons to be admitted and the formula at issue in a manner which established a definite line of prejudicial settlement

Two stages in trial.

¹ AULUS GELLIUS, *Noctes Atticae*, XIV, 2.

for the various parties. The mother of one set of claimants (Glaukon and Glaukos) was admitted to claim, and an urn was put up for the votes likely to be cast in favour¹ of her and of her sons. Such an arrangement was much more than a purely technical decision as to the number of claimants. It was the result of the recognition by the archon of certain views as to the relative rights to succession of various members of a family, and the claim of a mother as a member of a family seems in this case to be in advance of the rules of strict law. The importance of the juridical functions of the magistrate conducting an *ἀνάκρισις*, and eventually deciding on the avenue which an action was to follow (*εἰσαγωγή*), is indirectly indicated by the fact that the principal magistrates who had to act in law were regularly helped by legal advisers (*συνήγοροι*). At the same time one cannot suppose that the decision of an archon or any other investigating and presiding magistrate was absolute and could not be reversed. As a matter of fact in this speech against Zenothemis, for example, the *παραγραφή* or exception of Demon is directed really against the procedural course adopted by the investigating magistrates (the *θεσμοθέται*). The affair was being tried on lines of commercial jurisdiction, and Demon contested this by raising the *παραγραφή*. This means that although the case had been treated as a *δίκη ἔμμηνος*, the party who was interested in having a trial on general lines of contract could plead in that direction even when the process had been opened in the *δικαστήριον*. In other words the question could not be considered as finally decided by the presiding magistrate.²

Another line of restrictions arose from the practice of the *δαιτηταί*. It is quite evident that this institution of arbitrators played an exceedingly important part in the judicial life of Athens. Most of the civil cases went through this channel, and a great many of them did not reach the stage of the *δικαστήριον* at all. Our information as to the *δαιτηταί* shows to begin with that the membership of

¹ ISAIOS, XI. Cf. WYSE, p 673; [DEMOSTHENES], XLIII, §§ 8-10.

² On the *παραγραφή* see LIPSIVS, 848 f.

that college was a very numerous one, and that the position of a *δαιτητής* was highly considered and connected with very grave responsibility. We hear of appeals to the general body of arbitrators by which *δαιτηταί* who were supposed to have acted wrongly were put to trial and condemned to severe penalties.¹

This is one side of the matter, but what is even more important is that the practice led to definite limitation in the procedure of the Heliastic tribunal itself. Aristotle states in the *Athenian Constitution*² that the procedure in the Heliaea was restricted to the use of documents which had been produced before the *δαιτητής*: "It is not allowed to make use either of laws or of judicial demands or of evidence other than such as has been produced before the arbitrator and has been included by him in the sealed casket." This hardly requires a commentary: the notice shows conclusively that the parties had to take great care in the discussion before the arbitrator not to omit any part of the evidence or anything which might turn out to be of material importance for their case, as this would have prejudiced their position before the Heliastic Court.

There is also another point of view on which depended a supplementary kind of justice. In Athenian law cases of flagrant crime were treated by summary methods, and self-help and the interference of police magistrates were allowed to a considerable extent.³ A thief, for example, caught in the act could be taken, bound, and led off to prison by the injured party (*ἀπαγωγή*). Or else the assistance of the police in the shape of the interference of the Eleven (*οἱ Ἐνδεκα*) could be required. These cases very often resulted in summary sentences, and evidently the convicts were not always able or willing to appeal by *ἔφεσις* to the *δικαστήριον*, in spite of the fact that theoretically such a way was open to them, at any rate against condemnations of a serious kind.

¹ DEM. XXI, 86 f. Cf. *Ath. Const.* 53, 6.

² *Ath. Const.* c. 53 οὐκ ἔξεστι δ' οὔτε νόμοις οὔτε προκλήσεσι οὔτε μαρτυρίαις ἀλλ' ἢ ταῖς παρὰ τοῦ δαιτητοῦ χρῆσθαι ταῖς εἰς τοὺς ἐχίνοὺς ἐμβεβλημέναις.

³ See on the subject LIPSIUS, *Attisches Recht und Rechtsverfahren*, 309 ff.

Another set of measures of summary jurisdiction arose from cases in which the safety of the People was involved directly or indirectly. The Greeks were very sensitive in this respect, and allowed great latitude to denunciation. There were various forms of procedure of this kind; the most common were *φάσις* and *μήνυσις*, the first arising from a denunciation made by a citizen, the second from one made by a denizen or a slave. In both cases the administrative authorities took the matter up and acted, as it were, on the lines of prerogative for the sake of the "defence of the realm." A third variety was connected with attempts of men who for some reason had been deprived of civil rights to exercise any of these rights—breaches of *ἀτιμία*. These led to an *ἐνδειξις*, a special form of delation coupled with administrative action against a person supposed to be guilty of the infringement. Without attaching too much importance to these forms of procedure one has to take stock of them because we have to account for many cases in our records which spring from the exercise of these special methods. The peculiarity of all actions proceeding from denunciation was that the delator had a personal interest in bringing the action, as he could claim a part of the fine in case of pecuniary condemnation or confiscation.

Before leaving this subject of supplementary measures of a judicial character we must notice the attempt to create local judges for cases in which it would have been a hardship to call up the litigants to Athens. A special tribunal was instituted for such cases by Peisistratos, the *δικασταὶ κατὰ δήμους*; in the legislation of the tyrant the institution had a political meaning: he wanted to decentralize as much as possible the life of Attika, so as to secure more or less the quiet possession of central power for himself and for his successors; there is evidence as to a policy of the tyrants in preventing people from coming too often to Athens, and of course the creation of justices for local cases tallied well with such a policy.¹ But the idea had a meaning for ordinary purposes in the administration of law,

¹ *Ath. Const.* c. 16.

especially as regards the settlement of less important disputes; therefore the *δικασταὶ κατὰ δήμους* reappeared as the Thirty in the democratic period, and eventually the number of these magistrates was increased to forty. They acted partly on the spot in minor cases (up to ten drachmae), and their decisions on such occasions were taken by each judge personally. Besides this they presided over the decisions of tribunals in Athens, and this part of their jurisdiction is connected with the settlement of disputes which involved more considerable interests and were therefore taken over to the city.

Such are the principal features of the purely judicial organization from a general point of view. By the side of these we find an extensive use of State trials: the practice is a characteristic side of the life of the city, in which political conflicts could not be disentangled from the purely technical treatment of lawsuits. The principal avenues in this respect were provided by two forms of procedure, the *προβολή* and the *εἰσαγγελία*. Harpokration's *Lexicon* supplies a definition of the *προβολή* in connexion with the so-called *καταχειροτονία*.¹ The meaning of the passage is that the Demos could in the course of a political assembly decide that certain citizens, or magistrates, or pleaders who had misused their right of accusation (*συκοφάνται*) should be brought to trial. The first step in this case, however, consisted in obtaining a declaration of the people that such and such a person was in the opinion of the Assembly guilty of a crime. After such a declaration the case went, however, its usual course in one or the other tribunal of the people. The best illustration of the procedure in such a case is given in the speech of Demosthenes against Meidias. The speech starts from circumstances which are not mentioned in Harpokration's notice. Meidias was accused by Demosthenes of having insulted him when he was acting for the people as Choragos, by tearing his vestments and beating him. It is thus a case of an insult to a person

¹ HARPOKRATION'S *Lexicon* (ed. Dindorf, 1853) s.v. *καταχειροτονία*: ἔθος ἦν Ἀθήνησι κατὰ τῶν ἀρχόντων καὶ κατὰ τῶν συκοφαντῶν προβολὰς ἐν τῷ δήμῳ τίθεσθαι· εἰ δέ τις καταχειροτονηθείη, οὗτος εἰσῆγετο εἰς τὸ δικάστηριον.

representing the People on a great ceremonial occasion. The process which could have started in an ordinary course by a *δίκη βιαίων* or a *γραφὴ ὑβρεως* is brought into a political channel, as Demosthenes explains, because he wanted to emphasize the fact that the People had been attacked in its dignity in the person of its representative.¹ The accusation was intended to provoke a prejudicial declaration by the People, while the real trial with examination of the evidence was to take place before a Court. But it is evident that the pronouncement of the Assembly was to be reckoned with as a very serious support for the accuser in the subsequent trial. The interest of the oration is increased by the fact that Demosthenes mentions several similar accusations from recent Athenian history. In one of the cases quoted by him we hear of a remarkable complication of the usual procedure in the *δικαστήριον*. The person who had brought the *προβολή*, a foreigner, was willing to drop the case altogether, but the People proceeded with the investigation, and we hear that a special proposal as to punishment (*προστήμῃσις*) was made at the trial of the case in the *δικαστήριον*.² Unfortunately we are not informed about the manner in which such a special proposal as to penalty was carried through. It may be guessed that this was done on behalf of the State by the *βουλή*, or possibly by some *συνήγορος* representing the People, but all such suppositions are based on general inferences.

Εἰσαγγελία.

A much more serious aspect was assumed by political trials conducted as *εἰσαγγελίαι*. This was a denunciation made directly to the People in their Assembly, and calling for an exertion of the People's authority and not merely for an expression of opinion, as in the *προβολή*. The procedure in this respect underwent a considerable change in the fourth century. We have to reconstitute its history chiefly on the strength of two cases: one is the famous case of the *εἰσαγγελία* brought against the commanders at Arginusae, of which an account has been preserved in Xenophon's *Hellenika*.³ The second case is

¹ DEM. XXI, 33.

² *Ibid.* 176. Cf. above, p. 50 f.

³ XEN. *Hellenika*, I, vii.

presented by Hyperides' speech in favour of Euxenippos, which gives us the law and illustrates the practice of the *εἰσαγγελία* about the middle of the fourth century B.C.¹ The Arginusae trial was obviously conducted by very irregular methods, but the legal process can be ascertained from the contention of men like Euryptolemos and Sokrates, who were opposing the rush of the extremists led by Kallixenos. It was material that the trial should be conducted through two stages resulting in two decisions; one was to establish the procedure to be followed and the law which had to be applied; in the second stage and by a second vote the actual facts were to be considered and the sentence had to be delivered. The law which it was proposed to apply was the decree of Kannonos as to high treason, with the eventual application of the death penalty in case of conviction.² As a matter of fact the decision was rushed through one session of the Assembly in disregard of the distinction between the scheme of procedure, which had to be settled by the Assembly in the first stage, and the material consideration of facts after adequate defence. It is important to establish that legally even in these political trials the settlement as to procedural form ought to have been clearly distinguished from the examination of the facts. In other words, although the political aspect of the trial gave the discussion a summary character and rendered it juridically incomplete, some guarantees were provided in law against purely arbitrary proceedings.

When we come to the time of Hyperides, we find that the experience gathered from the case of Arginusae and other precedents, like the trial of Miltiades or of Kimon, had led to a much more careful formulation of the law. The heads of possible accusation are stated in as many words in the quotation from the *νόμος* referred to by Hyperides. "For what offences," he says, "do you think impeachments are to be made? This you have already

¹ See below, p. 152.

² XEN. *Hell. loc. cit.*, § 20. (Εὐρυπτόλεμος ἔλεξεν) ἵστε δὲ . . . πάντες ὅτι τὸ Καννοῦ ψήφισμά ἐστιν ἰσχυρότατον, ὃ κελεύει, εἴαν τις τὸν τῶν Ἀθηναίων δῆμον ἀδικῆ, δεδεμένον ἀποδικεῖν ἐν τῷ δήμῳ, καὶ εἴαν καταγνωσθῆ ἀδικεῖν, ἀποθανεῖν εἰς τὸ βάραθρον ἐμβληθέντα, τὰ δὲ χρήματα αὐτοῦ δημευθῆναι καὶ τῆς θεοῦ τὸ ἐπιδέκατον εἶναι.

written down in detail in the law, so that no one should be ignorant on the subject. 'If one,' says the law, 'destroys the people of Athens . . . or conspires for the destruction of the people or forms a (political) club or if one betrays a town or some ships or a fleet or an army, or as an orator says what is not best for the Athenian people in consideration of a bribe.'"¹ It is somewhat strange that by the side of accusations of high treason appear processes against pleaders misusing their power of private accusation (*συκοφάνται*), but this notice shows how important it was to prevent the further growth of that particular abuse. It is another question, of course, how far the method was an appropriate one and what practical results it could achieve. Hypereides does in fact complain that the terrible weapon of *είσαγγελία* was being used for futile accusations about all sorts of small matters, such as charging a high price for the hire of musicians, enrolment in the wrong deme, or the recital of dreams, as in the case of his own client, Euxenippos.² This wretched man had been dragged into an *είσαγγελία* process because he had reported to the people a prophetic dream which he had dreamt in a sanctuary where he had been sent by the people to ascertain the advice of the gods. His report as to the dream had led to measures which ended in disaster, and the dreamer was taken to task by *είσαγγελία*. The whole procedure throws a strong light on the lack of clear distinction between judicial and political functions. It has to be added, however, that at any rate in the fourth century the People did not give the decisions directly in cases of *είσαγγελία*, but empowered the ordinary Heliastic Courts to pronounce sentence as to facts—again an application of the dualism between procedure *in jure* and *in judicio*. Judicial authority was, however, directly derived in this case from the intervention of the Sovereign Demos.

¹ HYPEREIDES, IV (III), § 7 f. *ἐάν τις . . . τὸν δῆμον τὸν Ἀθηναίων καταλύῃ . . . ἢ συνίη ποι ἐπὶ καταλύσει τοῦ δήμου ἢ ἑταιρικὸν συναγάγη, ἢ ἐάν τις πόλιν τινὰ προδῶ ἢ ναῦς ἢ πεζὴν ἢ ναυτικὴν στρατίαν, ἢ ῥήτωρ ὧν μὴ λέγῃ τὰ ἄριστα τῷ δήμῳ τῷ Ἀθηναίων χρήματα λαμβάνων.*

² *Ibid.*, § 3.

CHAPTER VIII

RELATIONS BETWEEN CITIES

1. *International Law and the Right of Reprisals.*

THE exclusiveness of Greek city-institutions has given rise to a fundamental misconception in regard to the treatment of international relations. It is a common error to suppose that the Greek world was deficient in this respect, that there could not be any talk of international law in societies sharply divided into a number of small republics.¹ As a matter of fact it was not so, and a closer study shows that on the contrary the world of Greek cities was particularly adapted to the development of a certain kind of international, or—to speak more correctly—intermunicipal relations. The point is that not one of these cities was really self-supporting in the sense attached to the term by Aristotle. Under stress of circumstances they could exist for some time in isolation, as it were in a state of siege or blockade. But under normal conditions each of these small political units was dependent in a high degree on supplies of goods and ideas from abroad; in the existence of every one of them the intercourse with neighbours, the exchange of native products for foreign imports, was of first-rate importance. The case of Athens may serve as an illustration. Attika was deficient in the very first element of economic life—the poor soil could not provide the corn necessary to feed its population. Hence a series of protectionist measures and prohibitions of export,² etc. The opening of trade routes connecting Athens with granaries in the Bosphoros and in Sicily played a great part in Athenian history;³ and at the time of its flourishing expansion Athens became a centre of international intercourse without ceasing to be the home of some 21,000 privileged citizens.

Develop-
ment of
Inter-
national
Law in
Greece.

¹ E. g. LAURENT, *Histoire du droit des gens*.

² LYSIAS, XXII; DEMOSTHENES, XXXII.

³ BELOCH, *Griechische Geschichte*, I, 395 ff.

The activity of intermunicipal intercourse in religious and literary life, in games and competitions of all kinds, was one of the most essential and remarkable features of Greek history, and it would be impossible to understand the influence of the Homeric poems, of Ionian philosophy, of the art of Pheidias and Praxiteles,¹ without the background of this common intermunicipal organization. It is characteristic that the practice of the great national games was not entirely interrupted even by feuds between the various cities², and that consultations with the oracle of Delphi were carried on at the same time by the Lakedaimonians and by their enemies in Athens and in Thebes.

Commercial relations and the juridical effects of traveling and settlement in foreign parts were not less necessary and prominent consequences of the situation. For our purpose, the inter-municipal action of the ordinary institutions of Greek States is even more important than exceptional manifestations of solidarity, and the occasions for such action in the classical period of Greek history were numberless and varied.

Distress
and
reprisals.

The practices in this respect fall naturally into two groups. There were cities which, though not at war with each other, had not established definite agreements as to the treatment of disputes between their respective citizens, and there were other cities which had come to some understanding in this respect. In the first case, apart from the intervention of patrons, by means of which a member of one State enforced claims against a member of another, recourse had to be taken to procedure by self-help, and, indeed, we commonly find men led away into captivity, (*ἄγειν*) and property taken away by distress (*φέρειν*) because offended persons were seeking to obtain compensation for wrongs or to assert some right. This is termed *συλᾶν* in the case of distress as well as in the case of reprisals. Needless to dwell on the arbitrary character of such methods, but it must be borne in mind that such raids were not by any means simple outbursts of lawless violence.

¹ E. MEYER, *Geschichte des Altertums*, III, 433 ff.

² Cf. HERMANN-THUMSER, *Lehrbuch der griech. Antiqu.* I, pp. 78 ff. SZANTO, s. v. *ἐκχειρία* in *Real-Enc.* V, 2162.

As frequently happens in ancient law, distress was used as a means of obtaining justice by self-help. Another feature of the procedure was that distress or reprisals are not necessarily directed against one's opponent, but might be levelled against relatives of his, or even against his countrymen at large. Such cases were considered as a justified taking of hostages, and designated by the special term *ἀνδροληψία*.¹

This form of self-help, although exceedingly common, presented obvious inconveniences, and one of the principal objects of international agreement between Greek cities was to replace it by some form of regular jurisdiction. In order to put an end to the state of natural savagery in the relations of the citizens to those of neighbouring States, one city would "grant justice" (*δωσιδικία*) to another. A very good illustration of such a public act is to be found in the ancient treaty (fifth century B.C.) between two Lokrian cities—Chaleion and Oiantheia—preserved on a bronze tablet in the British Museum.² Self-help was not abolished by it, but reduced to juridical methods.

"It is forbidden to any man of Oiantheia to carry off a foreigner on the territory of Chaleion, and to any man of Chaleion to carry off a foreigner on the territory of Oiantheia, or to seize property by way of distress.

"Whosoever distrains property belonging to a foreigner shall be allowed without exposing himself to seizure to take away the goods by sea, except from the harbour below the city. If the seizure be made without right, the fine shall

¹ *Real-Enc.* s. v. ἀνδροληψία.

² MICHEL, 3 (HICKS, 31). Α. Τὸν ξέρον μὲ χάγε[ι]ν ἐ τῆς Χαλειίδος τὸν Οἰανθεία μεδὲ τὸν Χαλειέα ἐ τῆς Οἰανθείδος, μεδὲ χρέματα αἱ τι συλοῖ τὸν δὲ συλὸντα ἀνάτος συλῆν τὰ ξενικὰ ἐ θαλάσας χάγεν ἄσυλον πλὰν ἐ λιμένος τὸ κατὰ πόλιν. Αἱ κ' ἀδικος συλοῖ τέτορες δραχμαὶ αἱ δὲ πλέον δέκ' ἀμαρᾶν ἔχοι τὸ σῦλον ημεμόλιον ὀφλέτο, φότι συλάσαι. Αἱ μεταφοικεοὶ πλέον μενὸς ἐ ὁ Χαλειεύς ἐν Οἰανθεία ἐ Οἰανθείς ἐν Χαλειοῖ, τῆς ἐπίδαμιαὶ δίκαι χρέστο. Β. Αἱ κ' ἀνδιχίζοντι τοι ξενοδίκαι ἐπομότας ηελέστο ὁ ξένος ὀπάγον * τὰν δίκαν ἐ χθὸς † προξένο και φιδιο ξένο ἀριστίνδαν ἐπὶ μὲν ταῖς μναιαῖας και πλέον πεντεκαίδεκ' ἄνδρας ἐπὶ ταῖς μείωνις ἐννὲ' ἄνδρας. Αἱ κ' ὁ φαστός ποί τὸν φαστὸν δικάζεται κατὰς συνβολὰς δαμοργὸς ηελέστα τὸς ἠορκομότας ἀριστίνδαν τὰν πεντορκιαν ὀμόσαντας τὸς ἠορκομότας τὸν αὐτὸν ἠόρκον ὀμνύειν πλεθὺν δὲ νικέειν. DARESTE, *Revue des études grecques*, II, 318-21. Cf. OTT, *Zur Kenntniss der griechischen Eides*, Leipzig, 1896, p. 123.

* = ὁ ἐπάγων.

† = ἐκτός.

be four drachmae. If the person distraining keeps the thing seized for more than ten days, he shall pay the value of it once and a half. If a man of Chaleion is a resident established more than a month at Oiantheia, and *vice versa*, he shall have recourse to the justice of the city. . . . If the affair is carried before the judges who deal with foreigners, the foreign claimant shall choose sworn persons from among the notables, but *not* his proxenos nor any fellow-citizen. For processes involving one mina or more he shall have fifteen sworn persons, for those involving a smaller amount he shall have nine. If a citizen pleads against another citizen in virtue of the treaty, the demiurgi (magistrates) shall choose sworn assessors from among the notables, after having taken the quintuple oath. The sworn assessors shall in their turn take the same oath, and the verdict shall follow the majority."

Even in cases of treaty relations between two cities, self-help may play a part in the defence against illegal distress or violence. The way was open in such case to the intervention of a *vindex*, to use the Roman term and notion. Striking illustrations of this counter-action by any member of the contracting States may be found in the manumission inscriptions of Delphi,¹ and in the inscriptions commemorating the consecration of Teos to Dionysos, accompanied by guarantees of *ἀσυλία* on the part of neighbouring cities.² The formulae are:—*αὐτοσαντὸν συλέων καὶ οἱ παρατυγχάνοντες ἀζάμιοι ὄντες καὶ ἀνυπόδικοι πάσας δίκας καὶ ζαμίας. ὁ βουλόμενος, ὁ θέλων, ὁ παρατυγχάνων κύριοι ἔστωσαν ἀφελόμενοι καὶ ἀποδιδόντες τοῖς ἀδικημένοις.*

2. *The Granting of Justice (δωσιδικία).*

The
"granting
of jus-
tice."

In contrast with these methods of self-help stood the system by which the citizens of a foreign city obtained a standing before the Courts of a State according to certain rules: this is described as the "granting of justice," *δωσιδικία* or *δικαιοδοσία*, and the agreements regulating

¹ *Griech. dial.-Inschriften*, 1721, 1749, 1857, 1936.

² MICHEL, 51 ff. See HITZIG, *Altgriechische Staatsverträge über Rechtshilfe*, 39, 40.

the procedure in such cases were called *συμβολαί* or *σύμβολα* and the procedure itself *δίκη ἀπὸ συμβόλων*.¹

When justice is "granted" to a foreigner the simplest way is to apply the laws of one or the other State according to certain rules appropriate to the various modalities of the controversy. Thus a so-called "conflict of laws" takes place. The account of the struggle between Sparta and Argos in the fifth book of Thukydides (c. 79) presents a good example of the application of this method in classical Greece. The sixth clause of the treaty of 418 B. C. provided that "justice shall be administered to individual citizens of each State according to their ancestral customs." This can only mean that the tribunal before which the case was brought was to apply either the law of Argos or the law of Sparta, and, as the choice of the particular law to be applied was made dependent on descent, the only outstanding question is whether it was the status of the plaintiff or of the defendant that was considered decisive. The common practice in Greece was that, *ceteris paribus*, when personality was taken as the standard of selection, litigation proceeded in accordance with the status of the defendant. The personality principle was sometimes modified by taking account of the *forum domicilii* of the defendant.²

In the treaty between Athens and Phaselis (395-385 B. C.)³ two different principles are mentioned side by side. The principle of the *forum contractus* is introduced for conventions made in Athens, but on other occasions the direction of the case depends on the defendant's domicile. Conventions made outside Athens were not to be interpreted in accordance with Athenian law, and this can hardly mean anything else but the concession to the Phaselites of the application of their laws in the case of contracts made with their city.

An important consequence of the frequency and multiplicity of intermunicipal relations was the tendency of the

General-
ization of
laws.

¹ AR. Pol. III, 9, p. 1289 a *σύμβολα περὶ τοῦ μὴ ἀδικεῖν*. See HITZIG, *op. cit.* 31.

² WILAMOWITZ-MOELLENDORFF, *Hermes*, XX, 240. GILBERT, *Staatsalterth.*, I, p. 487. LIPSIUS, p. 966.

³ MICHEL, 6. Cf. COLEMAN PHILLIPSON, 120.

various city customs and laws towards generalization and unification. Rules of common law grew up on an intermunicipal basis, and towards the end of the fourth century one may speak of a private international law of Greece, which, though not codified, was governed in most important respects by similar if not identical principles. This is stated in as many words in Demosthenes' oration against Lakritos concerning commercial laws.¹

In the speech against Zenothemis a similarity of trade customs is implied by the fact that in a trial conducted at Athens one of the parties proposes to obtain evidence as to a transaction concluded at Syrakuse, while a Massaliote trader pleads on the strength of a document executed at sea with a skipper, and the magistrates of Kephallenia order a Massaliote ship to sail to Athens in view of its original destination to that port. Nor is that community of legal principles restricted to commercial affairs, as may be gathered from Isokrates' Aiginetic speech, dealing with the validity of a will.²

The processes which led to the building up of a Common Law of Greece can be clearly discerned. To begin with, there was colonization, in which all the Greek cities of any importance took part. It resulted in the transfer of rules and usages across the seas to different places. Thurioi, Kerkyra, Olbia, the Chalkidike, &c., were as many centres for the spread of the customs of Athens, of Korinth, of Miletos, of Chalkis, &c.³ The compulsory tie of political allegiance was sometimes altogether discarded, but, as in the case of the United States as regards England, the legal traditions of the metropolis persisted in the new surroundings, although with some variations in detail.

Leagues
and federations.

A second powerful influence brought to bear on the unification of intermunicipal law was the action of leagues and confederacies. The most potent influence in this respect was, of course, exercised by the first Athenian-

¹ XXXV, § 45. See above, p. 4.

² See above, p. 5. Cf. E. WEISS, *Z. SS. Rom. Abth.* XXXIII, pp. 215 f.

³ See e.g. the treaty between the Epiknemidian Lokri and the Lokrian colonists in Naupaktos (fifth century B.C.), ROEHL, *I. G. A.* 321, MICHEL, 285. *Griech. dial.-Inscr.* 1478.

Delian league.¹ Its power made itself felt through the greater part of the fifth century, and the gradual assumption by Athens of jurisdiction in important cases led necessarily to the introduction of Athenian methods and principles in the administration of law.² This "reception" of Attic law by the allies of Athens was, however, the effect of governmental pressure rather than that of intermunicipal agreements, and, although its results were permanent and important, their discussion does not lie within the scope of our inquiry. The methods adopted by the second Athenian league in the fourth century are more interesting from our point of view.³ This alliance was framed with the distinct object of avoiding the subjugation of the allies by Athens, and, in the treaties with various members of the league, the leading city had to renounce expressly the right to keep garrisons and to acquire land within the territory of the allied commonwealths.⁴ As regards jurisdiction, it was to follow the ordinary lines of the conflict of laws, while appeals had to be decided not by the Heliæa but by the Council of the League.⁵

The report of a case has been preserved in which the decision fell against an Athenian who had infringed the rule forbidding the acquisition of landed property in an allied State (*C. I. A.* II. 17). As a matter of fact, the leading city did encroach in many ways on the autonomy of the fellow-republics, and turned its hegemony to advantage in order to increase its political power. But this is matter of political history rather than of law.

The oligarchical confederation of Boiotia in the fifth century, whose organization has been made known to us in detail through the discovery of the Oxyrhynchus fragment of Theopompos' *Hellenika*,⁶ was constructed on a principle of genuine representation of the eleven sections (*μέρη*) of

¹ MORRIS, *American Journ. Phil.*, V (1884), 298 ff.

² H. WEBER, *Attisches Prozessrecht in den attischen Seebundstaaten*. On the *συνμαχία* turned into an *ἀρχή* see Hermokrates' speech in Syrakuse. THUK. VI, 76.

³ See on the subject BUSOLT, *Der zweite attische Bund*.

⁴ *C. I. A.*, II, 17, 49, 49^b.

⁵ Cf. *C. I. A.*, IV, 2, n. 54^b (DITT. *Syll.*³. I, 173), ll. 45 f. IV, 2, n. 88^d, 1, 13 f. *C. I. A.*, II, n. 546, l. 21.

⁶ *Hellenica Oxyrhynchia*, ed. Grenfell and Hunt, ch. 4.

the land, and the hegemony of Thebes was based mainly on the greater number of its representatives in the regional and in the central councils. Disputes between the members of the confederacy were brought before a Federal Court composed on the usual proportional basis; it is not known to what extent this Court acted as a tribunal of appeal, or of first instance, but it may be supposed that the ordinary rules as to domicile and *lex contractus* applied, subject to occasional revision of judgements by the central Court.

Arbitra-
tion.

Apart from articles of Confederation, international intercourse was conducted under customary rules and under treaties. A number of the latter have come down to us in their documentary form, and we can judge from them to what extent the device of *arbitration* was resorted to in this world of independent States. It was the natural outcome of conflicts between cities anxious to settle disputes by legal process.¹ The Kerkyraians complained in Athens in the course of the negotiations which preceded the Peloponnesian war that the Spartans did not want to try conclusions on equal terms according to convention, but preferred force to justice.² The ordinary expedient was to agree upon an umpire—either a foreign statesman like Periander or Themistokles, or, more often, a city in whose impartiality both parties had confidence.³ The *πόλις ἑκκλητος* thus selected conducted the proceedings with all formalities necessary to secure careful examinations of claims and evidence. A classical example of such an arbitration is presented by the inscription commemorating the proceedings in a trial before a court of Knidos between the cities of Kos and Kalymna.⁴ This case falls into the second century B. C., but there are many notices of similar proceedings on earlier occasions, and there

¹ M. N. TOD, *International Arbitration*, Oxford, 1913.

² THUK. I, 34.

³ DEM. XVIII, 134.

⁴ *I. J. G.*, I, 158 ff. Cf. TOD, *op. cit.*, p. 49: "The inscription consists of four parts. A. The oath taken by members of the Knidian tribunal. B. Directions regarding the production of evidence and the conduct of the trial. C. A statement of the case for the claimants and of the amount of their claim. D. A record of the verdict and a list of the advocates on each side."

can be no doubt that similar methods of procedure were commonly recognized and developed in the most minute particulars.¹

An important variety of intermunicipal justice arose when law had to be administered not by arbitral, but by municipal Courts. Such cases were of daily occurrence in connexion with commercial transactions. If a ship belonging to a Milesian citizen came to Athens and discharged a cargo owned by merchants of Smyrna, all sorts of disputes might arise out of transactions and delicts of the shippers, the crew, the passengers, the consignees. Apart from ordinary rules of conflict of laws, Athenian Courts had to take cognizance of disputes under intermunicipal agreements—*δίκαι ἀπὸ συμβόλων*—of customs of trade and navigation, of general principles of law and equity in the punishment of delicts and the award of compensation.² Unless the dispute grew into an international quarrel, it was regularly considered and decided by Athenian Courts—by the *ναυτοδίκαι* or, later on, by a section of the jury, under the chairmanship of *θεσμοθέται*.³ The procedure in these cases when they did not assume the character of public law trials (*γραφαί*) was of a simplified kind, as befits commercial jurisdiction. In Athens it was provided in the fourth century that the case should be tried within a month after the action had been brought.

The provision of treaties and agreements between independent States raises the fundamental question of sanctions for the fulfilment of the obligations laid down in them. Sometimes the payment of fines in case of infringement is mentioned in the text, as e.g. in the case of the treaty between

¹ Cf. LÉCRIVAIN, s.v. *epheſis* in DAR. et S. TOD, *op. cit.*, *passim*.

² THUK., I, 77. Cf. LIPSIVS, *Attisches Recht und Rechtsverfahren*, p. 972.

³ DAR. et S., s.v. *θεσμοθέται*. LIPSIVS, *op. cit.* 86. It is not unlikely that the transfer of the jurisdiction from the *ναυτοδίκαι* to the *θεσμοθέται* was connected with the regulation of appeals to the *Heliaea*. The *ναυτοδίκαι* probably judged without juries in order to expedite commercial cases; when this jurisdiction was passed on to the *θεσμοθέται* it was found necessary to set a definite term for the discussion of the cases. The procedure in *ἐμπορικὰ δίκαι* may be illustrated by DEM., XXXIII and XLV.

Elis and Heraia¹ (588-572 B.C.) in which we find stipulated the payment of one talent of silver to the Olympian Zeus. Wagers are made in litigation with corresponding deposits to satisfy the winning party; sometimes, again, hostages are given to ensure the carrying out of the provisions; this latter expedient was, of course, chiefly used in cases of public obligations. But the principal guarantee of the fulfilment of treaties and conventions was the *oath* of the parties. Now this may mean very little or a great deal. We know by experience that interests and passions may turn the most solemn asseveration into a scrap of paper, and the history of ancient Greece provides many examples of treachery of that kind. But it would be a gross error to suppose that the religious sanction implied by the oaths and imprecations had no real meaning or weight. Its breach entailed not only loss of credit—a most important source of influence in the world—but it clashed with beliefs and moral feelings which were strongly established and powerful in the classical world. It is not for nothing that treaties, when concluded and ratified, had to be confirmed by the oath of the whole population of a State, or at least of large and influential sections of its population.²

The formulae of these oaths are characteristic: they are personal and not representative, because the ancient city was a concrete reality, and not a corporation in the modern sense, with the attributes of a *persona ficta*. In the earlier stages of Greek history the fear of the *ἄγος* incurred by the violation of an oath was certainly a strong deterrent, though, of course, like all deterrents, it did not prevent occasional breaches of faith under temptation. Even in later times the religious sanction had not lost its meaning, because religion afforded the natural channel for those supermunicipal and supernational feelings which form, as it were, the second root of international law.

Principles of
humanity.

The claims of civilization and of humanity were not vain words for the Greeks; in spite of the narrowness of their civic organizations, they had a vivid sense of personal

¹ C. I. G., 11. MICHEL, I, 1 αἱ δὲ μὰ συνέαν τάλαντόν κ' ἀργύρο ἀποτίνοιν τῷ Δι' Ὀλυμπίῳ.

² See above, pp. 107 f.

dignity and of moral restraint, as well as a sense of beauty and a thirst for truth. No one who has read the story of the interview between Priamos and Achilles in the *Iliad* can fail to recognize that, amidst all the horrors of ruthless fights, Greek youths were brought up to harbour humane feelings towards the unfortunate and the vanquished. The way in which Thukydides relates the atrocities committed by his countrymen as well as by their enemies—the slaughter of Mytilene, the slaughter of Melos, the slaughter of sailors on neutral ships, is in itself a piece of evidence and a lesson. And the popular roots of these feelings were intertwined with religious conceptions. It is to the Ζεὺς ξένιος that a wanderer in a foreign land appealed for protection. It is at the sacred hearth that a refugee sought an asylum from vengeance and pursuit,¹ and when the refugee took on his lap the child of the householder, he made the latter think of what fortune might have in store for his offspring. A curious set of commandments bearing on humane conduct has come down to us in connexion with the traditional lore of a noble family in Athens, the Buzygae.² A similar though much shorter set of commandments was adopted by the Amphiktyonic League of Delphi and Thermopylae.³ This League might be regarded rightly as an embryonic League of Nations; its constitution goes back to a very early period in the colonization of Greece by Hellenes—its membership⁴ was restricted and its methods rudimentary, but it was an attempt to embody the notion of international justice in an organized institution. The religious authority of Delphi gave it powerful support, and it was not devoid of compulsory sanctions. In this respect its endeavours stranded, as usual, on the divergence of interests and the inequality of forces of its component members. Twice the League, in order to enforce its decrees, carried on prolonged

The Amphiktyonic tribunal.

¹ E. g. Themistokles at Admetos' hearth. See above, p. 101.

² TOEPFFER, *Attische Genealogie*, p. 139.

³ Cf. as to free trade between allies, PLUT. *Perikles*, 29 προσεγένοντο Μεγαρείς, αἰτιώμενοι πάσης μὲν ἀγορᾶς ἀπάντων δὲ λιμένων ὧν Ἀθηναῖοι κρατοῦσιν εἶργεσθαι καὶ ἀπελάνεσθαι παρὰ τὰ κοινὰ δίκαια καὶ τοὺς γεγενημένους ὄρκους τοῖς Ἑλλησιν.

⁴ See on the subject BUERGEL, *Die pyläisch-delphische Amphiktyonie*. Cf. HERMANN-THUMSER, I, 90 ff.

wars with the help of coalitions of cities. In both cases these wars were made to serve the interests of the great powers—Sparta and Makedon. This is, however, a difficulty common to all states of society dominated by territorial sovereignty, a difficulty which could only be removed by the building up of a World State—a contingency very distant even in our own time.

As for the Greeks, their intermunicipal humanity was undoubtedly restricted during the early and the classical period to the circle of Hellenic civilization. The barbarians were regarded as inferior by nature; notice, for instance, Aristotle's account of the barbaric roots of slavery.¹ But this pride of race begins to undergo a remarkable transformation towards the end of the classical age. Instead of the racial it is the cultural aspect that is thrust into the foreground, and hereby a transition is provided to a different world in which Hellenism appears not as a national peculiarity, but as a badge of civilization. One of the forerunners of the Hellenistic age, Isokrates, has expressed this in as many words:² "Our city has so far surpassed the rest of mankind in power of thought and speech that her disciples have become the teachers of the rest; she has made the name of Hellene seem to belong no longer to the race, but to the mind, so that the name is given to those who share in our culture more than to those who share the common blood."

¹ *Pol.* I, 3-6.

² *ISOKR.* IV, 50.

CHAPTER IX

CRIME AND TORT

1. *Penal actions (γραφάι).*

THE treatment of criminal law in Blackstone's *Commentaries* starts from a distinction between public and private wrongs—the former affecting the community at large, while the latter are taken to injure primarily private persons. Blackstone's definition has been criticized on the ground that any infringement of legal right is directed against the commonwealth which has acknowledged and guaranteed these rights.¹ But although the opposition between private and public wrongs may not be an absolute one, it is fully justified from the "subjective" point of view in so far as breaches of law may be opposed either by the individuals immediately concerned or by the community at large, if the latter deems itself directly menaced in its interests or in the fundamental principles of its political and legal order. These two aspects of legal redress are sharply distinguished in Greek jurisprudence. Individuals seek to enforce their rights contested or infringed by other persons by means of "appeals to justice"—*δίκαί*. If the interests of the city are directly affected by the act or omission of a person subjected to its jurisdiction, a penal action is instituted by an accusation in writing—*γραφή*.² In both cases the trial starts, as a rule, in the shape of an action brought by a citizen, or in certain cases by a denizen or a foreigner, as there did not exist in Athens or in other Greek cities any office corresponding to the public prosecutor of English law or the *procureur* of Continental systems; but the contrast between private prosecution (*ιδία*) and the redress of public wrongs (*δημοσία*) is clearly perceived and followed up to its consequences as regards compensation and punishment. The

Classifica-
tion of
wrongs.

¹ KENNY, *Outlines of Criminal Law*, pp. 5 f.

² Cf. G. M. CALHOUN, *On Oral and Written Pleadings in Athenian Courts in Transactions of American Philological Association*, vol. I (1919), pp. 177 ff.

contrast may be illustrated, for example, from Demosthenes' speech against Meidias. The orator brought a *προβολή*, that is, a political accusation, against his enemy, who had treated him in a humiliating manner on a solemn occasion, and he asserted that he had renounced the more profitable course of bringing a private action for compensation, in order to punish Meidias signally for the public wrongs inflicted on the city in the person of her Choragos.¹

Choice of
actions.

Readers of the Greek orators are familiar with these two kinds of suits: *δίκαι*, private actions, dealing with the settlement or adjudication of rights as between members of the community, and *γραφαί*, actions in writing, arising when the object of the suit was punishment. The Greeks used them in a way very different from the legal practice of the present day; they had a much wider scope in choosing between criminal and civil action. Special emphasis was laid on the *freedom* of the party in choosing the form of procedure. An orator is often at pains to explain to his hearers that various alternatives were open to him, giving also the reasons for his choice. Sometimes he even goes so far, as to confess that he was not strong enough to carry through the more drastic alternative, and therefore confined himself to the easier course. To take a familiar example from the private orations of Demosthenes²: Ariston brought an action of assault (*αίκία*) against Konon. He describes how this man and his friends set upon him, beat him, and robbed him of his clothes; he explains that these crimes rendered Konon liable to actions for robbery and contumelious aggression (*ὑβρις*), but in the circumstances the plaintiff and his friends did not think it wise to institute *criminal* proceedings, and he decided to seek only

¹ DEM. XXI, § 28 εἰ δ' ἐγὼ τὴν ἐπὶ τῶν ἰδίων δικῶν πλεονεξίαν ἀφεῖς, τῇ πόλει παραχωρῶ τῆς τιμωρίας, καὶ τοῦτον εἰλόμην τὸν ἀγῶν' ἀφ' οὗ μηδὲν ἐστὶ λῆμμα λαβεῖν ἐμοί, χάριν, οὐ βλάβην δήπου τοῦτ' ἂν εἰκότως ἐνέγκοι μοι . . . Cf. §§ 25 and 32.

² *Ibid.* LIV, § 1 . . . ἔλαχον αὐτῶ τὴν δίκην τῆς αἰκίας ταυτηνί. πάντων δὲ τῶν φίλων καὶ τῶν οἰκείων οἷς συνεβουλευόμεν, ἔνοχον μὲν φασκόντων αὐτὸν ἐκ τῶν πεπραγμένων εἶναι καὶ τῇ τῶν λωποδυτῶν ἀπαγωγῇ καὶ ταῖς τῆς ὑβριεως γραφαῖς, συμβουλευόντων δέ μοι καὶ παραινούντων μὴ μείζω πράγματ' ἢ δυνήσομαι φέρειν ἐπάγεσθαι, μηδ' ὑπὲρ τὴν ἡλικίαν ὧν ἐπεπόνθειν ἐγκαλοῦντα φαίνεσθαι, οὕτως ἐποίησα καὶ δι' ἐκείνους ἰδίαν ἔλαχον δίκην, ἥδιστ' ἂν . . . θανάτου κρίνας τοῦτον.

damages. In another speech¹ there is a general statement about choice of action. "Take theft: if you have lost something, many methods are open to you.—Are you able-bodied and confident in yourself? Take the thief to prison; but you risk the penalty of a thousand drachmae. Are you not so strong? Take the archons with you; they will do it. Are you afraid of this too? Indict him. Do you distrust yourself, and are you too poor to pay the thousand drachmae? Sue him for larceny before the Arbitrator, and you will run no risk."

The sharpness of the contrast is, however, modified by the fact that a very important group of offences, treated by all modern systems under the general rubric of crimes—murder, manslaughter, poisoning, arson—are initiated by *δίκαι* and brought to trial, not by any qualified citizen who wished to do so, but by the offended party or by relatives of the latter. These actions are, therefore, private as regards procedure, but they come before special courts of great traditional authority—the Areiopagos and the Epheetae in Athens—and result in the infliction of heavy penalties. The reason is not far to seek—the trials in question were still conducted in accordance with ancient customs of tribal oligarchy (*τὰ πάτρια*) and projected, as it were, like a primeval rock in the midst of the more recent layers of enacted law. It would be an anachronism to apply to them the concepts of private and public wrongs, in the same way as to other modernized forms of action; they must be treated as a group by themselves.

The first thing that strikes one in the study of Greek criminal law is the extraordinary development of repressive actions against officials.

Accusations
against
officials.

After the reforms of Ephialtes and Perikles the Areiopagos lost its high position as a court of redress in administrative cases.² These loom large in the jurisdiction of the

¹ DEM. XXII, § 26 πολλὰς ὁδοὺς . . . διὰ τῶν νόμων ἐπὶ τοὺς ἡδικηκότας, οἷον τῆς κλοπῆς. ἔρρωσαι καὶ σαντῶ πιστεύεις ἄπαγ', ἐν χιλίαις δ' ὁ κίνδυνος. ἀσθενέστερος εἶ τοῖς ἄρχουσιν ἐφηγοῦ τούτο ποιήσουσιν ἐκείνοι. οὐδέτερον βούλει τούτων γράφον. καταμέμφη σεαυτὸν καὶ πένης ὧν οὐχ ἂν ἔχοις χιλίας ἐκτείσαι' δικάζου κλοπῆς πρὸς διαιτητὴν καὶ οὐ κινδυνεύσεις . . . τῆς ἀσεβείας κατὰ ταῦτ' ἐστ' ἀπάγειν, γράφεσθαι, δικάζεσθαι πρὸς Εὐμολπίδας, φαίειν πρὸς τὸν βασιλέα.

² ARIST., *Ath. Const.*, 8.

democratic institutions—the Heliaea, the Council of Five Hundred, and, on certain occasions, the Assembly. Magistrates, commissioners, and their subordinates were examined in a searching manner on their appointment (*δοκιμασία*) and were sometimes suspended from their functions (at the *ἐπιχειροτονία*) in order to answer some charge against their conduct in office.¹ They were subjected to a stringent audit before the *λογισταί* on laying down their office, and also threatened by specific accusations before the *εἴθνος* of their Phyle (tribe).²

Besides, there was, of course, always the possibility of an attack prompted by political motives and directed indiscriminately against the entire activity of a statesman: the process against Perikles with its undefined charge of embezzlement and corruption, or injustice (*κλοπῆς καὶ δόρων, ἢ ἀδικίου*) is a well-known example of such vague accusations.³ But Athenian procedure took cognizance also of a great variety of specific delicts, for which members of the administration could be sued. Failure to conform to laws or rules in the exercise of the duties of a *πρόεδρος* or an *ἐπιστάτης* gave rise to a *γραφὴ προεδρική* or to a *γραφὴ ἐπιστατική*; failure to present accounts within the prescribed times to a *γραφὴ ἀλογίου*; misconduct of ambassadors to a *γραφὴ παραπροσβείας*; failure to inscribe the name of a public debtor on the list of persons liable—to a *γραφὴ ἀγραφίου*; failure to render an account of the exploitation of mines—to a *γραφὴ ἀναπογράφου μετάλλου*; the acceptance of bribes—to a *γραφὴ δόρων* corresponding with a *γραφὴ δεκασμοῦ* in the case of corruption of judges. The *γραφὴ ἀδικίου* was directed against the misuse of judicial or administrative authority, while the *γραφὴ κλοπῆς δημοσίων χρημάτων* was used to prosecute officials guilty of embezzlement. It is hardly accidental that we are informed with such details of the varied forms of procedure against magistrates and employees. Many of our notices are derived from the lexicographers, who had

¹ HERMANN-SWOBODA, *Griech. Staatsalt.*, III, 121.

² WILAMOWITZ-MOELLENDORFF, *Aristoteles und Athen*, II, 217 ff.

³ It is hardly necessary to say that on all questions of procedure our chief authority is LIPSIVS (*Attisches Recht und Rechtsverfahren*).

at their disposal a much greater store of materials than we possess now, as they could refer to many pleadings which have been lost since. The reason for this wealth of information is not far to seek—the holders of office in democratic cities like Athens were not only persons invested with temporary authority, but in a sense the targets of popular distrust and envy, and the professional accusers (the *συκοφάνται*) aimed their darts chiefly at them.

In connexion with these actions stand a number of Political crimes. political offences attributable both to officials and to plain citizens. There were of course actions (*γραφὴ ἀστρατείας, λιποστρατίου, λιποταξίου, λιποναυτίου*), against deserters and men who had shirked military duties, and (*γραφὴ δειλίας, γραφὴ περὶ τοῦ ἀποβεβληκέναι τὴν ἀσπίδα*) against cowards. High treason gave rise to two distinct forms of prosecution: the crime was termed either *κατάλυσις τοῦ δήμου* or *προδοσία*, and, in view of the grave danger to the State and the necessity of stringent measures the procedure indicated for regular prosecution was the *εἰσαγγελία*, in which the accusation proceeded not from private persons, even if the accused had been denounced by them, but from the Council, while the decision was to be pronounced by the people in the Assembly. The contents of the charges are definitely stated in the law by which the *εἰσαγγελία* procedure was regulated in the fourth century. In his speech on behalf of Euxenippos¹ Hypereides compares his own (correct) mode of procedure in such cases with the incorrect methods of Euxenippos' accuser, Polyeuktos: "When I accused Philokrates," he says, "I brought him into Court and wrote a proper charge as the law directs; I stated that 'he being an adviser of the people (*ρήτορα*) said what was not in the best interest of the people of Athens, having received money and presents from those who were working against the people.' And," he continues, "I repeated this many times in the charge."

But although the law is reported in the most definite form in this speech of Hypereides, the prosecutions against persons suspected or accused of high treason and of attempts to subvert democracy go back to the age of Solon, and

¹ HYPER., IV, 29 f. Cf. 39. Cf. above, Chap. VII, p. 151.

were formulated more and more sharply. Andokides tells us of a decree in this sense carried by Demophantes after the fall of the Four Hundred,¹ and Xenophon in relating the proceedings against the commanders at Arginusae refers to a decree of Kannonos on the subject, disregarded by the enraged people²; and Lysias mentions similar dispositions after the fall of the Thirty.³ The *γραφὴ ξενίας* was used against foreigners or unfree persons who had surreptitiously obtained admission into the ranks of citizens.⁴

An action has to be mentioned here which has been already considered in another chapter,⁵ namely the *γραφὴ παρανόμων*, the accusation of illegality. One point has, however, to be noticed now in addition to what has been stated before. In the extant speeches of the Attic orators in cases of alleged illegality, e. g. in Demosthenes' speeches against Timokrates, Aristokrates, Aristogeiton, the pleaders are never satisfied with urging the formal reasons for invalidating the law: they always dwell a great deal on the substantial inconvenience or injustice of the law they are attacking as well as on the supposed bad motives and bad character of the prompter of the impugned enactment. This is of course a feature common to Greek pleadings in general, a feature conditioned by the fact that the judges in the case were not trained lawyers but men of the world more amenable to impressions and suggestions than to juridical deductions. There is, however, yet another consideration which acted in the same sense—a consideration embodied in various forms of action. A legislator, a statesman, an orator, who had persuaded the people, was not absolved from responsibility when the people had adopted the measures advocated by him. On the contrary, he remained responsible for the results, and if they were disas-

¹ ANDOK., I, § 95 ὁ δὲ νόμος τί κελεύει, ὃς ἐν τῇ στήλῃ ἔμπροσθέν ἐστι τοῦ βουλευτηρίου; "ὃς ἂν ἄρξῃ ἐν τῇ πόλει τῆς δημοκρατίας καταλυθείσης, νηποιεῖ τεθνάναι" κτλ. § 96 εἴαν τις δημοκρατίαν καταλύῃ τὴν Ἀθήνησιν ἢ ἀρχὴν τινα ἄρχῃ καταλελυμένης τῆς δημοκρατίας.

² See above, Chap. VII, p. 151.

³ LYSIAS, XXXI, §§ 8, 26.

⁴ LIPSIUS, 412.

⁵ See chapter VII. It applied of course not only to legislation, but to illegal proposals of all kinds; e. g. DEMOSTHENES, XXII.

trous or discreditable he became the scapegoat on whom the Demos took revenge for its own folly. Turning to the procedure against misconceived legislation, we notice that closely allied to the *γραφὴ παρανόμων* stand attacks against unprofitable laws and against their promoters—*γραφὴ τοῦ μὴ ἐπιτηδείου νόμου*. Lipsius cites in illustration the well-known speech of Demosthenes against Leptines. The argument of the orator is almost entirely directed against the material injustice and lack of generosity of Leptines' law; its clauses are contrasted with those of a bill advocated by Demosthenes' client and his companion. Twice the measure carried through by Leptines is expressly characterized as unprofitable (*μὴ ἐπιτήδειος*).¹ Lipsius' conclusion that there was a specific action which took its name from the unprofitable character of the law seems, however, too bold,² and technically this side of the attack might well be combined with the usual *γραφὴ παρανόμων*. Anyhow, the close connexion between formal and material grounds shows the force of the view that a legislator is answerable for the consequences of his measures even to the extent of criminal responsibility. In the case of Leptines this liability did not arise, as we know, because a year had elapsed since the impugned enactment had been approved and confirmed by the people.

There was yet another form of action based on an accusation of "deceit of the people" (*γραφὴ ἀπάτης τοῦ δήμου*). A charge of this kind would naturally lead to prejudicial proceedings (*προβολή*), and possibly to an impeachment by *εἰσαγγελία*. Miltiades was tried in this manner after the failure of the expedition to Paros.³ As a supplementary guarantee against misdirection by insidious proposals Athens demanded from orators in the Assembly a clean record as regards fundamental requirements of morality. Aischines enumerates four such requirements in his speech

¹ DEM. XX, § 88 ἀναγνώσεται τὸν νόμον ὑμῖν, ὃν παρεισφέρομεν γράψαντες ἀντὶ τοῦδε, ὃν οὐκ ἐπιτήδειον εἶναι φάμεν.

² LIPSIUS, *Att. Recht*, 383-6.

³ HERODOTUS, VI, 136 Ξάνθιππος . . . θανάτου ὑπαγαγὼν ὑπὸ τὸν δῆμον Μιλτιάδεα ἐδίωκε τῆς Ἀθηναίων ἀπάτης εἴνεκεν. Cf. DEM. XLIX, § 67 νόμων ὄντων, εἴαν τις τὸν δῆμον ὑποσχόμενος ἐξαπατήσῃ, εἰσαγγελίαν εἶναι περὶ αὐτοῦ.

against Timarchos¹: an orator addressing the people must not be guilty of any of the following four misdeeds: beating his father or his mother or refusing to support them in need; failure to perform military service, or cowardice in the field (throwing away of the shield); prostitution (*ἐταίρησις*); squandering of inherited property. On these grounds a citizen might be prevented by *εἰσαγγελία* from delivering a speech to the Assembly. If he had already done so, the way was open for a prosecution. Demosthenes brought a charge of this kind against Androtion, whom he accused amongst other things of having addressed the people in spite of the fact that he had practised *ἐταίρησις*.²

The people of Athens had to guard not only against deception and misdirection by demagogues. Their system of accusation by private citizens lent itself to flagrant abuses. It was often openly recognized by accusers that they were prompted by personal hatred or revenge in trying to subject the defendants to public condemnation.³ No wonder we are told that public accusation came to be practised as a craft and an art: Aristophanes' Kleon is the caricature of the demagogue who relies on his skill not only in flattering Demos, but in exciting his wrath; and a number of political leaders are described as professional sykophants, e. g. Androtion,⁴ Theokrines.⁵ As an antidote against this evil Athenian law allowed a criminal action for malicious prosecution, *γραφὴ συκοφαντίας*.⁶ A sykophant was not merely one who spread false and defamatory information about a person, but one who made use of public accusation for a malicious and unjustified purpose. Unfortunately, although we constantly come across charges of this kind in various speeches, no oration held in a specific trial for *συκοφαντία* has been preserved.

To the already mentioned public wrongs are to be added offences against the gods of the city. As the life of the

¹ AISCH. I, § 28. See below, p. 190. Cf. § 54.

² DEM. XXII, §§ 25-34. § 30 *ἐκ τούτου τοῦ νόμου, μήτε λέγειν μήτε γράφειν ἐξεῖναι τοῖς ἡταιρηκόσιν.*

³ E. g. DEM. XX, 1-3. LYSIAS, XII, § 2.

⁴ DEM. XX, 65-7.

⁵ *Ibid.*, LVIII, 2, 12, &c.

⁶ LIPSIUS, *op. cit.*, p. 448.

State was intimately connected with their worship,¹ any infringement of their rights and interests constituted a heavy public delict. Two actions could be brought to safeguard these rights—the *γραφὴ ἀσεβείας* and the *γραφὴ ἱεροσυλίας*. The first was directed against those who subverted the creed and worship of the national deities, and the trial of Sokrates is the best-known example of it²; the other was aimed at offenders who had violated the right of property of the gods. Such sacrilege was treated quite differently from ordinary theft or burglary.

The only department of common law, apart from the political one, which is safeguarded with minute precautions by many and various forms of action is family law. All relations connected directly or indirectly with family organization were protected by *γραφαί*. Foremost stand proceedings against *κάκωσις*, a term which may be rendered by “ill-treatment”. The First Archon, on whom lay the supervision and protection of citizen families and of their property, received accusations against those who had ill-treated their parents (*κάκωσις γονέων*), or orphans (*κ. ὀρφανῶν*), or daughters inheriting landed property in the absence of sons (*κ. ἐπικλήρων*), or wards (*κ. οἴκου ὀρφανικοῦ*).³ In all these cases the damage to property was estimated as well as the ill-treatment of persons, and the actions for *κάκωσις* are matched by another group of accusations which aim at preventing the squandering of patrimony by extravagance and inefficient management. There was a *γραφὴ τοῦ καταδεδοκέναι τὰ πάτρια*, dispersing ancestral property,⁴ and also a *γραφὴ παρανοίας*, aiming not merely at putting insane persons under curatorship—a proceeding which does not involve criminal responsibility—but at inhibiting the squandering of property to the detriment of eventual heirs.⁵ Lastly, the *γραφὴ ἀργίας* mentioned in historical narratives can hardly have been directed against sloth and laziness as a vice: its probable justification lay in the neglect of family interests and the resulting material damage to the family.⁶ The great development of actions protect-

Offences
against
the family.

¹ See above, Chapter V. Cf. (LYSIAS), VI, § 10.

² Cf. THONISSEN, *Droit pénal*, 180

³ AR., *Ath. Const.*, 56. 6.

⁴ LIPSIUS, p. 340.

⁵ *Id.*, p. 353.

⁶ *Id.*, p. 340.

ing family relations and property may be considered in itself as an expression of the importance of family organization in the political structure of the city. As we have already noted, the latter was considered in a sense as a federation of kindreds, and its social order was based even in democracies on the privileges of citizens of pure descent.¹

Ordinary
crimes.

In comparison with the manifold remedies provided against political offences, the domain of criminal law relating to ordinary crimes appears very restricted and undeveloped; a crime of that kind may either be an attack on the person of the plaintiff or a violation of his property rights. We find accordingly in Athenian law two main actions corresponding to these aspects—the *γραφὴ ὕβρεως* for offences against the person and the *γραφὴ κλοπῆς* for certain kinds of theft. Outside those two main actions there are only two crimes giving rise to a public action, namely procuration (*προαγωγεία*) and adultery (*μοιχεία*); the treatment of the former offence is not particularly characteristic of Athenian jurisprudence, but the manner in which the main actions mentioned above were conducted is worthy of attention.

Physical and moral injury to a person may be inflicted in several ways—by blows, by defamation, by contumelious treatment in general. In Athenian law the first two varieties give rise to private suits for compensation (*δίκαι*)—the *δίκη αἰκίας* and the *δίκη κακηγορίας*. On the contrary, contumelious treatment and intentional insults are considered to be public wrongs, and the accuser is entitled to a *γραφὴ ὕβρεως*. The consequences for the defendant, if convicted, are entirely different—in one case a fine estimated by the parties and decreed by the jury, in the other *infamia* (*ἀτιμία*), heavy fines or confiscation, sometimes even the death penalty. The classical illustration of *ὕβρις* is the behaviour of Meidias to Demosthenes, although the extant speech of the latter was delivered not before a tribunal, but before the Assembly in support of a prejudicial impeachment (*προβολή*).² The fact that Meidias had insulted a choragos made the offence an aggravated one, but any free citizen exposed to contumelious treatment of that

¹ Cf. above, Chap. V.

² DEM. XXI. See above, p. 61 f.

sort was entitled to have recourse to the penal action (*γραφὴ ὑβρεως*). The motive of the Athenian legislator in instituting a criminal prosecution for *ὑβρις* was evidently their intention to suppress the perverse habit of insulting behaviour as a vice tending to corrupt public morality. Therefore even *ὑβρις* against slaves was considered to be a public offence and threatened with punishment. In practice, however, there could hardly be much chance for a slave to carry through such an accusation, unless a citizen took up the case. It is in connexion with the injury to the strongest feelings of a family man that adultery was considered to be a public wrong and a subject for public prosecution. The *γραφὴ μοιχείας* was a substitute for private vengeance in these cases. Lysias' speech on the death of Eratosthenes illustrates the legality of personal revenge not only of an offended husband, but even of one who lived with a concubine.¹ If the adulterer was not killed on the spot, however, he could be captured, held in captivity by the offended party, and eventually brought to judgement by means of a penal action—*γραφὴ μοιχείας*. If there was no ground for such self-help the arrested defendant could, on his part, bring a counter-accusation for "false imprisonment as an adulterer" (*ὡς μοιχὸς εἰρχθῆναι ἀδίκως*). These penal actions were evidently intended to restrict as far as possible the range of allowable private self-help and revenge. In granting them, Athenian law established the point of view that a grave injury to the feelings, the honour, and the reputation of a citizen entitled him to seek, instead of ordinary compensation, a grievous punishment for the culprit.

Whether there was a corresponding penal action in regard to the rape of a virgin we do not know; to judge from the analogy of the Code of Gortyn² there may have been one. The matter may have been also taken up, however, from the point of view of damages, and therefore connected with a *δίκη* and not a *γραφὴ*.

¹ LYSIAS, I, §§ 30, 31 Ἀκούετε . . . ὅτι αὐτῶ τῷ δικαστηρίῳ τῷ ἐξ Ἀρείου πάγου . . . διαρρήδην εἴρηται τούτου μὴ καταγιγνώσκειν φόνον, ὃς ἂν ἐπὶ δάμαρτι τῇ ἑαυτοῦ μοιχὸν λαβὼν ταύτην τὴν τιμωρίαν ποιήσῃται. καὶ οὕτω σφόδρα ὁ νομοθέτης ἐπὶ ταῖς γαμεταῖς γυναῖξι δίκαια ταῦτα ἡγήσατο εἶναι, ὥστε καὶ ἐπὶ ταῖς παλλακαῖς . . . τὴν αὐτὴν δίκην ἐπέθηκε. Cf. DEM. XXIII, § 53.

² I. J. G. I, xxvii, 8-17.

A person bringing a *γραφή* of the kind described above exposed himself to the risk of a fine in case of defeat. The law allowed him therefore to choose his mode of procedure and to avoid the pitfalls of the criminal action by restricting his claim to one of civil compensation. This choice in regard to blows and abuse is discussed in the speeches of Isokrates against Lochites and Demosthenes against Konon.¹ The plaintiffs in both cases had certainly been treated in a most contumelious manner—one being thrashed by his enemy and the other (literally) “aspersed” from a slop-basin. Both inveigh passionately against the offenders, but both consider discretion the better part of valour and abstain from the risky venture of the trial for *ὑβρις*. It is interesting to find that the point of honour made all the difference between the civil and the criminal accusation in such cases, but it is also noteworthy that the People took up the high ground of a prosecution for crime not because it considered itself directly offended in the person of its citizens, but because the latter insisted on trying conclusions on these lines with their opponents. Similar peculiarities are to be observed in the treatment of offences against property. The action *κλοπῆς* is not necessarily a criminal action. A thief who had penetrated into a house might be exposed to various treatment according to circumstances. If he was caught *in flagrante delicto* he might be imprisoned and, at night, even killed. If he was pursued immediately after the theft and tracked to a neighbouring house, that house could be searched (*φωρά*) provided that certain conditions were observed by the search party. If the accusation rested on inference and was undertaken when some time had elapsed, an action *κλοπῆς* had to be brought, and it was conducted as a criminal action initiated by a charge in writing (*γραφὴ κλοπῆς*) only if the theft had been committed in the market-place, in the bath-house, or in some other public place. It is explained that a theft aggravated in this manner was deemed to affect directly the security of the city, which was particularly interested in the safety of the public buildings and places of public intercourse. Otherwise trial proceeded as a civil action² (*δίκη κλοπῆς*)

¹ ISOKR., XX; DEM. LIV.

² LIPSIVS, p. 438.

with a prospective penalty amounting to double the value of the stolen goods.¹ Housebreaking does not seem to have given rise to a special action.²

2. *Archaic forms of Criminal Procedure.*

A striking peculiarity of criminal jurisprudence in Athens was that the most grievous offences against the life of citizens were not considered to be directly within the range of public coercion. When an individual was killed the city left the prosecution to the relatives, and if there were no relatives or if they preferred entering into a bargain with the slayer, the latter was let off without further punishment.³ There were *δίκαι φονικαί*, but not *γραφαί φονικαί* in case of homicide, and this means that the affair was considered primarily as a private feud to be settled between the two parties by revenge or composition. This point of view had, however, to be reconciled with the existence of a well-ordered community: hence the peculiar procedure described in an inscription of 409 B. C. bearing a copy of the law of Drakon as to manslaughter,⁴ and in the speech of Demosthenes against Aristokrates,⁵ and mentioned with some additional details in Aristotle's *Athenian Constitution*⁶ and in Plutarch's biography of Solon.⁷ We need not rehearse the well-known enactment on unpremeditated homicide (*φόνος ἀκούσιος*) which gives leave to the members of the household (father, sons, and brothers) to declare a feud against the slayer, and to relatives of a second circle down to cousins and their sons to join in the pursuit, nor the clause which entitles them to effect, by unanimous consent, a compromise with the slayer allowing him to return from exile. Certain other points, however, require some attention. I have already noticed in a former chapter⁸ the fact that in the absence of relatives of the inner circles

Murder
and man-
slaughter.

¹ ARISTOTLE, *Problemata*, xxix, 14 *ἐὰν μὲν τις ἐκ βαλαρείου κλέψῃ ἢ ἐκ παλαιστρας ἢ ἐξ ἀγορᾶς ἢ τῶν τοιούτων τινός, θανάτῳ ζημιούται, ἐὰν δὲ τις ἐξ οἰκίας, διπλοῦν τῆς ἀξίας τοῦ κλέμματος ἀποτίνει.*

² LIPSIUS, p. 442.

³ GLOTZ, *La Solidarité de la famille*, pp. 309 ff. LIPSIUS, p. 610.

⁴ *I. J. G.* II, xxi, pp. 1 ff.

⁵ DEM. XXIII.

⁶ *Ath. Const.* 54.

⁷ c. 19.

⁸ Chapter V, p. 90.

ten members of the phratry chosen in accordance with precedence in birth rank (*ἀριστίνδην*) by the assessors (*ἐφέται*) are bound to take up the prosecution and entitled to settle with the slayer. The *γένος*—the intermediate unit between the family and the phratry—is passed over, evidently because a number of citizens were only *ὀργεῶνες* of some kind and not members of old *γένη*; and as the law had to formulate a general rule applicable to all, such men had to be content with a representation of their interest by their noble comrades in the same phratry. Aischines, for example, would have been represented in such a case by some of the Eteobutadae,¹ plebeians of the phratry of the Demotionidae by some scions of the house of Dekeleia,² etc. The point is of great interest in so far as it shows that the ancient scheme of avengers was originally constructed on agnatic lines, while in its modified form it proceeded from the household to the nearest heirs (the *ἀγχιστεῖς*) on both sides—through males and through females—to return to the agnatic organization of the phratry with its leading patriarchal kindreds (*ἀριστίνδην*).

Another point to be noticed is the distribution of cases of homicide among the three principal tribunals. Trials for murder were assigned to the Areiopagos, composed of acting and former Archons; unpremeditated homicide (manslaughter) was of the province of the Ephetae, the fifty-one representatives of the federation of kindreds in the Palladion, and justifiable homicide was tried by the Ephetae in the Delphinion. The question arises by what means the competence of one or the other of these Courts was to be determined. Lipsius solved the difficulty by suggesting that evidently the choice of the tribunal was determined by the nature of the plaintiff's action or of the defendant's opposition.³ This means, I suppose, that if the avengers did not feel confident of obtaining a verdict of wilful murder, they would not approach the

¹ AISCHINES, II, § 147.

² MICHEL, 951. Cf. above, Chap. V, p. 89.

³ LIPSIVS, p. 26. PHILIPPI, *Der Areopag und die Epheten*, seems to me to be in the right when he draws the inference that the assignment to a court was made by the kings.

Areiopagos but would bring their action before the king in the Palladion. This may sound plausible, but how would this account for the Delphinion? There could be no motive for the plaintiff to seek justice before a tribunal trying the question of legal homicide; this kind of trial would surely arise in most cases in consequence of a *defence* of the accused. If so, the attribution of the case must have been determined, not by the parties—especially not by the plaintiffs—but by a preliminary investigation carried out by some court or by the presiding magistrates (the king or kings).¹ When Antiphon informs us that even in a case of murder the accused could take to flight before the first decision had fallen, he may have had in view the result of such an *ανάκρισις*.² The uncertainty of the situation before the pronouncement of the judges as to the tribunal competent to try the case may also explain the passage of the pseudo-Demosthenic speech against Theokrines, in which the latter is said to have arranged a compromise with the slayers of his brother.³ The imputation cannot concern manslaughter, because compromise for *φόνος ἀκούσιος* was legal and constantly practised.⁴ It would also be out of place in a clear case of *φόνος ἐκούσιος*, in which perpetual exile was the only means of avoiding capital punishment. It is significant that the expressions of the speaker in the oration against Theokrines point to homicide in general and leave it undecided whether the case should have been tried by the Areiopagos or gone before one of the other tribunals.⁵

¹ I incline to refer to this function the words of Drakon's law, I, 35: *I. J. G.*, p. 2 *δικάζειν τοὺς βασιλέας αἰτιῶν φόνου, . . . τοὺς δὲ ἐφέτας διαγνώσκειν*. The duty of the king was to determine the point of law and the mode of trial; the Ephetae gave the verdict as to fact.

² ANT. V, § 13 *καίτοι ἐμοὶ εἰ μηδὲν διέφερε στέρεσθαι τῆσδε τῆς πόλεως, ἴσον ἦν μοι καὶ προσκληθέντι μὴ ἔλθειν, ἀλλ' ἐρήμην ὀφλεῖν εἶναι τὴν δίκην, τοῦτο δ' ἀπολογησαμένῳ τὴν προτέραν ἐξείναι ἔλθειν· ἀπασι γὰρ τοῦτο κοινὸν ἔστι*.

³ DEM. LVIII, § 28 *τελευτήσαντος αὐτῷ τοῦ ἀδελφοῦ βιαιῶ θανάτῳ, . . . ζητήσας τοὺς δράσαντας καὶ πυθόμενος οὔτινες ἦσαν, ἀργύριον λαβὼν ἀπὸ πλάγχθῃ*.

⁴ DEM. XXXVII, § 58 *ἀλλ' ὅμως ἀπάντων τούτων ὄρος καὶ λύσις τοῖς παθοῦσι τέτακται τὸ πεισθέντας ἀφείναι*. Cf. XXVIII, 22.

⁵ GLOTZ comes to the same result by another way (*Solidarité*, p. 381); I am, however, unable to follow his argument as to the distinction between compromises before and after sentence.

The next point to be established concerns the part played by the city in determining the condition of citizens convicted of homicide. When the Areiopagos pronounced a capital sentence on a murderer it was carried out by the public executioner in the presence of the relatives of the deceased. Thus the avengers were prevented from taking the law into their own hands when the murderer had not been killed *ἐπ' αὐτοφώρῳ*, on the spot. They had to be content with the moral satisfaction of having destroyed their enemy at the hands of public justice. The murderer could save himself by flight, and the law protected him from the "vendetta" of the offended family if he kept away from the soil of Attika (*ἀειφυγία*).¹ But if he returned, he exposed himself to the vengeance of the hostile kindred—he was considered as an outlaw, and could be killed by any one with impunity.² There is no reason to suppose that the fate of a person guilty of manslaughter and sentenced to conditional exile was different if he returned without having arranged a compromise with the relatives of the victim. His case would be covered by the clause on the *ἀνδροφόνοι* in the same way as that of the murderer. The city forbade, however, wanton cruelty to such outlaws: they might be killed, but it was not lawful to cripple or otherwise to ill-treat them. The clause may be part of a later addition to the original text of Drakon's law indicated by the words "*ὡς ἐν τῷ ἄξιονι εἴρηται*" in the speech against Aristokrates.³ The point about the protection accorded to fugitives who keep outside the frontiers seems to belong to the later amendment which may have been added when Drakon's law was re-copied and re-enacted in 409 B. C.⁴

The jurisdiction of the Areiopagos.

The Areiopagos was certainly the central tribunal for the decision of criminal cases according to traditional custom (*τὰ πάτρια*); the courts in which the king sat with the Ephetae as

¹ *I. J. G.* II, XXI, § 7, p. 4 (7) τοὺς δὲ ἀνδροφόνους ἐξεῖναι ἀποκτείνειν καὶ ἀπάγειν ἐν τῇ ἡμεδαπῇ, λυμᾶναισθαι δὲ μή, μηδὲ ἀποιῶν, ἢ διπλοῦν ὀφείλειν ὅσον ἂν καταβλάψῃ. Cf. *DEM.* XXIII, 28 ff. See below, p. 186.

² *Law of Drakon*, § 7. See above, note 1.

³ *DEM.* XXIII, § 31.

⁴ *GLOTZ*, *op. cit.*, pp. 319 ff, builds up a hypothetical and complicated theory on the analysis of the clause as given in Demosthenes' oration. Cf. *LIPSIUS*, p. 943.

his assessors were engrafted, as it were, on the more ancient institution of the Council on the hill of Ares. Indirect consequences of this later formation may be traced in certain facts of Athenian institutional history. In a sense the tribunal of the 300 representatives of the Eupatrid clans (*ἀριστίνδην αἰρεθέντες*) may be said to have been an enlarged and extraordinary commission of Ephetae appointed to try the accomplices of Kylon or their slayers.¹ The fifty-one (or fifty if the king was numbered as the fifty-first) assessors of the Palladion and of the Delphinion held their ground for a considerable time, but were replaced by heliasts either in connexion with the reform of Ephialtes or at the revision of the laws after 403 B. C. In any case the heliasts are found acting in the first half of the fourth century, so that the re-enactment of Drakon's law in 409 B. C. cannot have had a durable effect as to the composition of the Courts formerly held by Ephetae. On the other hand the Areiopagos remained master of the stronghold of criminal jurisdiction even though it was stripped of political power.²

Aristotle enumerates in the *Athenian Constitution* the criminal actions within the jurisdiction of the king archon,³ and his account is corroborated by Demosthenes' speech against Aristokrates. Apart from homicide, the king archon was the presiding judge in trials for attempting to establish tyranny, wounding with intention to kill, poisoning, and arson, and the central Court for all these trials was the Areiopagos.⁴ The duty of prosecuting persons conspiring to obtain tyranny was entrusted to the Areiopagos by the decree of Patrokleides⁵ in 405 B. C. The psephism was evidently voted by the people in a state of great excitement

¹ AR., *Ath. Const.* c. 1. Cf. PLUTARCH, *Solon*, 19 ὁ δὲ τρισκαίδεκατος ἄνων τοῦ Σόλωνος . . . ἔχει . . . γεγραμμένον Ἀτίμων ὅσοι ἀτιμοὶ ἦσαν πρὶν ἢ Σόλωνα ἄρξαι, ἐπιτίμους εἶναι πλὴν ὅσοι ἐξ Ἀρείου πάγου ἢ ὅσοι ἐκ τῶν ἐφετῶν ἢ ἐκ πρυτανείου καταδικασθέντες ὑπὸ τῶν βασιλέων ἐπὶ φόνῳ ἢ σφαγαίσις ἢ ἐπὶ τυραννίδι ἔφενγον ὅτε ὁ θεσμὸς ἐφάνη ὄδε.

² Cf. DEM. XXIII, §§ 65 f.

³ c. 57. 3.

⁴ DEM. XXIII, 22 δικάζειν δὲ τὴν βουλὴν τὴν ἐν Ἀρείῳ πάγῳ φόνου καὶ τραύματος ἐκ προνοίας καὶ πυρκαϊῆς καὶ φαρμάκων, ἐάν τις ἀποκτείνῃ δούς. Cf. ANTIPHON, VI.

⁵ ANDOKIDES, I, § 78.

and apprehension, in view of the desperate situation in Athens with the prospect of defeat and capitulation. We do not hear of its application in any particular case.

On the other hand all the other crimes in which jurisdiction is attributed to the Areiopagos are illustrated by forensic speeches. The wounding with intention to kill (*δίκη τραυμάτων ἐκ προνοίας*) is represented by a tetralogy of Antiphon,¹ and by Lysias' speech on the death from a wound of an Athenian whose name has not come down to us.² Poisoning is the subject of two important speeches of Antiphon, in which the principal argument for the defence consists in trying to prove that a fatal beverage was administered not as a poison but as an aphrodisiac charm or a medicinal drink.³ As for accusations of arson (*πυρκαϊά*), they seem to have been placed within the competence of the Areiopagos because the setting fire to a neighbour's house was regarded as an act of private feud. It may be supposed that if no casualties were caused by the fire, the matter would be considered merely from the point of view of material damage and give rise to a simple *δίκη βλάβης*.⁴

3. *The Elements of Crime.*

Mens rea.

The differentiation of tribunals for the trial of homicide shows the importance attached by the Athenians to the psychological element in criminal proceedings. The fundamental distinction between *φόνος ἐκούσιος* and *φόνος ἀκούσιος* turns on the presence or absence of the intention to slay (*πρόνοια*). In what circumstances was it allowable to put up a defence of this kind (*μη ἐκ προνοίας*)? Unquestionably death caused by an accident entitled a person to do so. Accident and self-defence were defined in a peculiar way in a law quoted in Demosthenes' speech against Aristokrates.⁵ Death arising from a blow which was meant to be inflicted on an enemy in battle, or from rough handling in a wrestling match, was deemed "bootless," and the orator goes on to explain that if a wrestler succumbs in a contest this must

¹ ANTIPHON, IV.

³ ANTIPHON, I, § 9; cf. VI, § 19.

⁵ DEM. XXIII, § 53. Cf. LIPSIUS, p. 610.

² LYSIAS, IV.

⁴ LIPSIUS, p. 984.

be regarded as an act of the gods. The rule as to slaying on the road (ἐν ὁδῷ) is not clearly expressed and does not fit well into the context. But there was evidently a tendency of defendants in cases of this kind to avail themselves of any proof of contributory negligence on the part of the victim to claim complete absolution. The imaginary defendant in Antiphon's second tetralogy¹ tries to make out that a boy killed by his spear was himself responsible for his death, because he ran over the course when it was forbidden to do so. The accuser sets up against this plea the curious assertion that an unfortunate accident of this sort shows that the gods were discontented with the slayer, and punished him for his want of piety by making him the agent of a homicide, however involuntary. This seems a far-fetched deduction, but as it was meant to serve as an example of an argument before the Ephetae at the Palladion it cannot be regarded as a mere attempt to mislead a popular court by sophistical suggestions. The delimitation between negligence and accident mentioned by Aristotle in the *Rhetoric*² evidently formed the subject of judicial controversies among the venerable assessors of the Palladion.

On the other side there lay the indefinite borderland between murder and manslaughter. According to Plato's *Laws*, death following on blows inflicted in a fit of anger was not treated in the same way as deliberately prepared murder;³ but this distinction, corresponding to our modern rules on the subject, can hardly have been clearly recognized by Athenian jurisprudence. There is, however, evidence that the defence was set up in some cases that as no weapons had been used, or prepared for use, there could not have been an intention to kill. This was urged by Lysias' client in the oration about a deliberately inflicted wound that caused death (περὶ τραύματος ἐκ προνοίας).⁴ He contended that as the wound in question had been inflicted by a blow with a shell picked up on the road, there had certainly been no premeditated attempt to kill. An-

¹ ANT. III, § 8.

² I, xiii. 16 ἔστι δ' ἀτυχήματα μὲν ὅσα παράλογα καὶ μὴ ἀπὸ μοχθηρίας, ἀμαρτήματα δὲ ὅσα μὴ παράλογα καὶ μὴ ἀπὸ πονηρίας.

³ PLATO, *Laws*, IX, 9.

⁴ LYSIAS, IV, § 6.

other point of view from which the inquiry as to *πρόνοια* might be productive of doubt and discussion arose in connexion with the possibility of mistake in the use of dangerous ingredients. Antiphon's oration against the stepmother¹ was delivered in a case in which two men had perished from the effect of a drug which was served to them in some wine. For the defence it was pleaded that the drink had been drugged by the concubine of one of them in order to excite his amorous inclination. The plaintiff did not dispute that a mistake of that kind had been made by the concubine who served the cups, but he maintained that she had been deliberately misled by his stepmother, who wanted to get rid of her own husband. The decision rested with the Areiopagos, but the fact that such arguments were used by a prominent pleader shows that defences of that kind were common, and had to be considered on their merits. In another speech of Antiphon the whole force of the defence consists in the proof that a choragos who caused the death of a singer by treating him to a certain drink could not on any account be made responsible for poisoning, but only for a most unfortunate mistake.² The importance attached to criminal intention explains why no material difference was recognized between the actual perpetrator of a homicide and its instigator. In the case of the stepmother just mentioned Antiphon puts side by side the action of the person who administered the drink without realizing what it might produce, and that of the woman who remained behind the scenes but was the real agent of the misdeed.³ The speech just referred to indicates at the same time that no attempt was made to draw distinctions in law between principals and accomplices or accessories, although pleaders would be sure to avail themselves of any circumstance likely to produce mitigation of the verdict. Another consequence of the principle of moral responsibility for crime was that conspiracy or plotting some one's destruction, if there was any attempt to carry the plot into execution, was tanta-

¹ ANT. I.

² ANT. VI.

³ ANT. I, 20 ἀνθ' ὧν ἡ μὲν διακονήσασα καὶ χειρουργήσασα ἔχει τὰ ἐπίχειρα ὧν ἄξια ἦν, οὐδὲν αἰτία οὐσα—τῷ γὰρ δημοκρίῳ τροχισθείσα παρεδόθη—ἡ δ' αἰτία τε ἦδη καὶ ἐνθυμηθείσα ἔξει, εἰάν ὑμεῖς τε καὶ οἱ θεοὶ θέλωσιν.

mount to actual homicide. The king was in charge of the trial *βουλευσεως* as well as of those of murder and manslaughter.¹ The root idea was the reaction of society against violence produced by hatred or self-will.

Yet, even apart from criminal intention, the shedding of blood had to be expiated as being a pollution of the city's soil.² All the forms of trial for homicide, with the possible exception of the one *ἐν Φρεαττοῖ*, were connected with shrines and sacred rites. On the hill of Ares the solemn oaths and sacrifices forcibly recalled to the mind the presence of deities watching over truth and justice. At the shrines of Pallas and of Apollo the wisdom of the judges was directed towards distinguishing between manslaughter and lawful homicide in self-defence, or in revenge. The trial resolved itself, if the latter defence was accepted, into expiatory rites at the shrine of Apollo. Even when death had been caused by an animal or an inanimate object, a stone or a beam, the kings of the city and of the tribes went through the ceremony of a judgement ending in expiatory sacrifices.³ In all cases the *ἄγος*, the curse called forth by violent death, had to be removed from Attika, and some of the principal acts of the pacification of civil strife in the seventh century were the expiatory functions performed by Epimenides of Krete. A poetic expression of popular beliefs on such matters has been preserved in the *Oresteia* of Aischylos: the Erinyes pursue the murderer up to the last, and he is absolved by a judgement of the Areiopagos under the direct intervention of Pallas and Apollo. It is not without meaning that the high tribunal stands in its original unity and that the two titular deities of the Ephetae Courts appear as protectors of the accused man. A tragedy is, of course, not a historical statement, but Aischylos would hardly have omitted to mention the subsidiary Courts if they had not been regarded as the offshoots of the Areiopagos.

¹ AR., *Ath. Const.* c. 57.

² Cf. GLOTZ, *op. cit.*, 62 ff. We may expect an attempt to reopen the question on the part of G. M. CALHOUN; see *Proceedings of the Classical Association*, Vol. XVIII (1921), pp. 87 ff.

³ DEM. XXIII.

Private
violence
and public
danger.

It is not necessary to dwell long on the exercise of self-help in the struggle against criminals. The latitude left to vengeance by kinsmen has been sufficiently and frequently described.¹ One point of detail may be noticed now, as it shows to what extent the pursuit of men guilty of inflicting mortal wounds was regarded as an act of private revenge. We learn from Demosthenes' speech against Pantainetos that if a person who had been mortally wounded pardoned his assailant before his death, this pardon barred further prosecution by the relatives.² The proof that a plaintiff in a case of wounding, or the man slain in a case of homicide, had himself begun the fight was considered a sufficient ground to establish a plea of self-defence (*ἤρξε χειρῶν ἀδίκων*).³ The same defence held good in the case of a culprit being taken *in flagrante delicto* (*ἐπ' αὐτοφώρῳ*). In the latter case it was common practice, however, not to risk an accusation of homicide, and to content oneself with the forcible arrest of a burglar or thief and his delivery to the public authorities for imprisonment (*ἀπαγωγῆ*).⁴ The private arrest (*ἀπαγωγῆ*) starts in this way from the seizure *in flagrante* (*ἐπ' αὐτοφώρῳ*), but the notion was extended in several directions. From Lysias' speech against Agoratos we learn that the Eleven, to whom the arrested persons had to be handed over, required from the accusers that they should state expressly that the arrest had been made *ἐπ' αὐτοφώρῳ*, and yet Dionysodoros, whose death Lysias' client is trying to avenge, was neither killed nor wounded by Agoratos, but only supposed to have fallen a victim in consequence of Agoratos' denunciation.⁵ It was admitted to be sufficient that the accused should be regarded by public opinion as miscreants (*κακοῦργοι*) in order to enable accusers to arrest and to conduct them before the Eleven.⁶ A third case where arrest was allowed by the side of self-help was that

¹ See especially GLOTZ, *op. cit.*, 76 ff.

² DEM. XXXVII, § 59.

³ ANTIPHON, IV β, § 1.

⁴ Cf. LIPSIUS, *op. cit.*, p. 38.

⁵ LYSIAS, XIII, §§ 85-87.

⁶ ANTIPHON, V, § 9 *κακοῦργος ἐνδεδειγμένος φόνου δίκην φεύγων, . . . καὶ ὡς μὲν οὐ κακοῦργός εἰμι οὐδ' ἔνοχος τῷ τῶν κακοῦργων νόμῳ . . . οὔτοι . . . μάρτυρες γεγένηται.*

of outlaws and persons deprived of civic rights (*ἄτιμοι*) when they showed themselves in the market or in temples or exercised public office. The first prohibition concerned those who had perpetrated a homicide and had been sentenced, or at any rate had not obtained reconciliation with the kinsmen of the deceased. The second came into operation in the case of state debtors who had not acquitted themselves of their debt, and yet had taken part in public life: we hear of capital sentence against such individuals.¹

In such cases the exercise of private force against the accused was justified partly by the strong feeling of personal hatred—as regards persons guilty of homicide,—partly, and even more, by considerations of public safety. The debtor who was remiss with his payment, the outlaw, the professional miscreant, were sources of danger to the State, and when their transgression was a matter of public notoriety they could be arrested and imprisoned either by other citizens or by the authorities—usually the Eleven—on a written accusation presented by a citizen (*ἔνδειξις*). This procedure rendered ineffective the usual guarantees of civic rights: the accused had to submit to the hardships and indignities of imprisonment; he was deprived of the liberty necessary to prepare an effective defence; his plight created an unfavourable impression and made it difficult to collect witnesses for the defence. Generally the person arrested in such a manner had leave to obtain bail if he was able to present three sureties, but in the case of the murder of Herodes treated in Antiphon's fifth speech such bail was refused and the accused man incarcerated on the strength of the deposition of a slave under torture.² No wonder procedure by *ἔνδειξις* played a great part in State trials for treason and infringement of the constitution.³ On the whole these summary forms of accusation and arrest throw vivid light on the police of public safety in Athens: the usual safeguards against arbitrary treatment of citizens gave way when the principle of public safety was invoked against them.

¹ DEM. XXI. ANDOK. I. LYS. VI.

² ANT. V.

³ AR., *Ath. Const.* 29, 4.

4. *Punishment.*

Doctrines
as to
punish-
ment.

In our age of extreme sensitiveness as to social responsibility for the evils of punishment it seems strange that the highly civilized Greeks were exceedingly callous as to the fate of individuals who had excited the wrath of the city. Even the best and most idealistic Greek thinkers were never troubled with misgivings on this point: they considered the infliction of evil, including the death penalty, as the most effective means of attaining civic virtue and of preventing vice and crime. Demokritos, for example, speaks of the necessity of destroying criminals as we destroy wild animals.¹ Plato in the *Laws* classified offences carefully, and decreed the death penalty for a number of them.² Protagoras, according to the statement in the dialogue bearing his name, argued that the chief means of political education was the enactment of laws likely to deter men from wrongdoing.³

The practice fully corresponded to the theory in this case; the death penalty was constantly decreed in laws and adjudged by the courts. An instance like that of Pyrrhos the Eteobutad, whom some of the judges wanted to condemn to death because he had sat as a juror in a tribunal while not absolved from a debt to the Commonwealth, and this not on account of arrogance, but of poverty—such an instance of harshness seems appalling to us,⁴ and yet it is by no means exceptional in the annals of Athenian judicature. The most terrible penalties are threatened against attempts to seize tyrannic power; the usurper and his offspring are doomed to extermination.⁵

Infamia.

I have already had occasion to mention the loss of civic rights by fugitive murderers (*ἀνδροφόνοι*).⁶ It extended also to those convicted of manslaughter who had not been admitted to pay composition (*ποινή*) by the relatives of the victim. Such a condition was, however, exceptional.

¹ DIELS, II. *Fragm.* 257, 258, 259, 260.

² *Laws*, IX, *passim*.

³ PLATO, *Protagoras* 324 a b. Cf. above, p. 35.

⁴ DEM. XXI, 182.

⁵ E. g. *Law of Ilion*, I. J. G., II, xxii, pp. 26 ff. and *Judgement of Eresos*, *ibid.* xxvii, pp. 161 ff.

⁶ Above, p. 180. Cf. GLOTZ, *Solidarité*, 485 ff.

Usually the loss of rights was connected with a declaration of *ἀτιμία* which did not involve the withdrawal of all protection, but only the loss of honour, of consequent political privileges, and in some cases confiscation of property.¹ A detailed but yet incomplete enumeration of different kinds of *ἀτιμία* is given by Andokides in his speech on the Mysteries.² He cites three groups of persons branded as infamous (*ἄτιμοι*): public debtors who had not acquitted themselves of the payments to which they were liable; persons who had incurred an ignominious sentence, e.g. citizens guilty of male prostitution (*ἐραίρησις*), convicted of theft, &c.; persons who had been deprived of specific rights—e.g. who were forbidden to bring a public action because they had made use of this right in a frivolous way and had failed to prosecute in actions brought by them. Convicts of the first category, according to Andokides, were punished in their property as well as in their persons, their land and goods being confiscated if they failed to pay. The second category suffered only in their persons (*σώματα*). Their principal disability was that they were debarred from participating in political life, standing as candidates for office, sitting on juries, &c. The third category was treated even more leniently in so far as the deprivation of active right concerned only certain specific functions like giving evidence on oath or bringing an action for illegality (*παρὰ νόμον*).

So far Andokides' enumeration corresponds to the facts. But *ἀτιμία* was pronounced on several other very important occasions. It could be decreed, for instance, against any one attempting to abrogate or to modify a law. Witness the psephisma concerning the foundation of the colony of Brea in Thrace in the age of Perikles³ and a similar prohibition in the statute of the Second Athenian League.⁴ It was a necessary corollary of all condemnation in trials for high treason.⁵ It threatened persons guilty of misconduct

¹ This distinction is often disregarded. See e.g. THALHEIM in *R.-Enc.* II, 2101 s.v. *ἀτιμία*.

² ANDOK. I, 73 ff.

³ *C. I. A.* I, 31. DITT. *Syll*³. I, 67, l. 25.

⁴ *C. I. A.* II, 17. DITT. *Syll*³. I, 147, l. 53.

⁵ PLUTARCH, *Solon*, c. 19.

against their parents. All professional vagrants and miscreants (*κακοῦργοι*) were *ipso facto* deprived of the ordinary guarantees of civic freedom.¹ Besides, we hear of many cases in which personal dishonour involves public *ἀτιμία*, as for instance in the case mentioned in a pseudo-Demosthenic speech, when a man was declared to be *ἀτιμος* because he had continued to live with his wife who had committed adultery.² One striking feature of *ἀτιμία* is described at great length in Aischines' speech against Timarchos. The orator dwells on the care with which the law prescribes to keep undesirable people from taking part in government or legislation.³ He mentions four types of "evil livers" debarred from political life: those who maltreat their parents or refuse them housing; those who shirk military service or play the coward; those guilty of bodily vices; those who squander their patrimony. These are excluded from the public platform, and if they still presume to use—or worse, to abuse—the privilege of speech they are to be subjected to *δοκιμασία*, and the verdict upon them rests with the Courts. On the whole, the prominence of *ἀτιμία* as a punishment of crime and vice seems as characteristic of the highly-strung sense of civic honour entertained by the Athenians as the importance attached to contumelious treatment in trials for *ὑβρις*.

Fines and imprisonment.

The penalty of imprisonment, so common in modern times, hardly existed in Greece, although temporary captivity was recognized as a means of preventing flight; it was the usual outcome of an *ἀπαγωγή*. As a substitute for this kind of compulsory seclusion the Athenians sold

¹ ANTIPHON, V.

² DEM. LIX, 87.

³ AISCHINES, I, 28-32 *τίνας δ' οὐκ ᾔετο δεῖν λέγειν; τοὺς αἰσχροῦς βιβιωκότας . . . καὶ ποῦ τοῦτο δηλοῖ;* "δοκιμασία," φησὶ, "ῥητόρων ἔαν τις λέγῃ ἐν τῷ δήμῳ τὸν πατέρα τύπτων ἢ τὴν μητέρα, ἢ μὴ τρέφων, ἢ μὴ πατρῶν οἰκῆσιν." . . . καὶ τίσι δεύτερον ἀπέιπε μὴ λέγειν; "ἢ τὰς στρατείας μὴ ἐστρατευμένους, ὅσαι ἂν αὐτῶ προσταχθῶσιν, ἢ τὴν ἀσπίδα ἀποβεβληκῶς." . . . τρίτον τίσι διαλέγεται; "ἢ πεπορευμένους ἢ ἡταιρικῶς." . . . τέταρτον . . . "ἢ τὰ πατρῶα κατεδηδοκῶς, ἢ ὧν ἂν κληρονόμος γένηται." . . . τούτους οὖν ἐξείργει ἀπὸ τοῦ βήματος, τούτους ἀπαγορεύει μὴ δημηγορεῖν. ἔαν δέ τις παρὰ ταῦτα μὴ μόνον λέγῃ ἀλλὰ καὶ συκοφαντῇ καὶ ἀσελγαίνῃ, καὶ μηκέτι τὸν τοιοῦτον ἀνθρώπον δύνηται φέρειν ἡ πόλις, "δοκιμασίαν μὲν," φησιν, "ἐπαγγειλᾶτω Ἀθηναίων ὁ βουλόμενος, οἷς ἔξεστιν," ὑμᾶς δ' ἤδη κελεύει περὶ τούτων ἐν τῷ δικαστηρίῳ διαγιγνώσκειν.

certain culprits into slavery; this manner of getting rid of undesirable elements is mentioned, for instance, in connexion with attempts by foreigners to get admission into the ranks of citizens.¹ Free men were not subjected to corporal punishment, which could always be inflicted on slaves. Indeed it was considered a principle of common law that the main difference between free men and slaves consisted in the fact that the former had to suffer in their property while the latter were coerced in their bodies.²

Fines and confiscations were indeed the ordinary penalties meted out to citizens and to foreigners of free status. It is unnecessary to recite the numberless references to fines in the laws, the decrees, and the speeches of pleaders. They were so varied and so oppressive that critics of democracy came to accuse popular governments, like that of Athens, of multiplying unjust condemnations in order to fill the public purse.³ As there was really no option but to condemn either to death (or to its substitute, banishment) or to a fine, it is difficult to see in what way the material losses to the convicted persons could be considerably mitigated. The distinction between fixed fines in trials without assessment (*ἀγῶνες ἀτίμητοι*) and varying fines in trial with free assessment (*ἀγῶνες τιμητοί*) depended entirely on accidental circumstances and had nothing to do with differences in principle. Confiscation was naturally reserved for particularly serious offences.

5. *Actions in Tort (δίκαι κατά τινος).*

Claims for legal redress of private wrongs were brought by means of actions of two different kinds: a plaintiff insisting on a right disputed or infringed by the defendant sued the latter by a *δίκη πρὸς τινα* which involved no penalty, although it might lead to certain payments in compensation of damages. On the other hand there was a group of actions—*δίκαι κατά τινος*—which started with an accusation against the defendant for a wrong supposed

¹ DEM. LIX; ISAIOS, VI.

² DEM. XXII, 55.

³ [XENOPHON], *Resp. Ath.*

Classifica-
tion of
civil
actions.

to be inflicted on the plaintiff. While the first set of trials turned mainly on questions of property and of contract, the second set was concerned with matters in which public force had to intervene for the restoration of disturbed legal order, although the questions at issue were considered mainly from the point of view of the infringement of private rights and of the consequent necessity of compensating for incurred material and moral damages. Besides these two classes of actions there was a third, covering what may be called prejudicial declarations of right—*διαδικασίαι*. These latter are closely allied to the *δίκαι πρὸς τινα* and their consideration may be postponed till the next chapters. The *δίκαι κατὰ τινος*, on the other hand, which correspond to English actions in tort, have to be considered in close connexion with criminal jurisdiction, as they apply frequently to the same or to similar subjects.

The simplest kind of prosecution for the illegal use of force arose in connexion with assault and battery. A person who had received blows could bring an action *αἰκίας*, in which the plaintiff was expected to prove that he had not been guilty of beginning the brawl himself. Isokrates' speech against Lochites and Demosthenes' speech against Konon deal with trials of this kind. Both pleaders lay stress on the fact that they might have prosecuted their adversaries by penal actions *ὑβρεως*, but as Athenian plaintiffs had a free choice of remedies and were by no means bound to give to the prosecution the character of a penal accusation, they both preferred the less hazardous course of an action in tort, with the prospect of substantial compensation in damages.¹ They magnified the losses incurred in order to be able to claim a high compensation (*τίμημα*) when the time came to estimate the material and moral damages suffered by them.

The action *βιαιῶν* covered various forms of wrong caused by violence. It was used in pursuance of a law of Solon² in cases of rape. The plaintiff must have been usually the father or *κύριος* of the maiden or boy who had been assaulted. It may be noticed that originally the compen-

¹ ISOKR. XX, §§ 5 ff. DEM., LIV, §§ 13 ff.

² PLUTARCH, *Solon*, c. 23.

sation was a fixed sum of 100 drachmae. Later on, however, as can be inferred from a speech of Lysias,¹ the culprit had to pay the "double price of the person" as compensation, one half of the fine accruing to him and half to the city. This notice is interesting in two ways: it shows that the Commonwealth did not disinterest itself in cases of tort, but claimed part of the fine as a fee for its services; the amount of the compensation is estimated at double the value of something or of some one. The most likely explanation seems to be that the citizens and other inhabitants of Attika were appreciated according to certain standards of value, somewhat in the manner of the mediaeval *wer-gelds*. The law of Gortyn gives a definite tariff of this kind in connexion with rape.²

In another direction the action *βιαιών* was used by those who had to complain of violent deprivation of their goods. The corresponding action as to immovable property was the *δίκη ἐξούλης* of which we shall have to speak at length in the next chapter.³ Here again the fine to be paid by the convicted defendant was estimated at double the value of the chattels "disseised." The unjustified claim of liberty for a slave was also treated as disseisin of a chattel; the action directed against the citizen making the claim bore the specific designation of *δίκη ἐξαιρέσεως* or *ἀφαιρέσεως εἰς ἐλευθερίαν*.⁴ As the slave had no standing in justice against his master, and any one who claimed to be the master of a slave could seize the latter by way of distress, the only remedy against fraudulent assertions of this kind lay in vindication. The *δίκη ἀφαιρέσεως* was introduced to prevent abuses on the part of those who assumed the responsibility of vindication.

The *δίκη κακηγορίας* may be mentioned here, as it was intended to protect persons against humiliating abuse. A law had been framed against this kind of wrong by

¹ LYS. I, § 32.

² I. J. G. xvii, §§ 8, 9, p. 358. GLOTZ, *Solidarité*, pp. 393 f. takes the duplication to apply to the price of a slave as the lowest unit of compensation. But the double fine occurs in all kinds of the *δίκη βιαιών* and not only in those in which slaves may be concerned.

³ DEM. XXI, § 44. Cf. below, p. 225.

⁴ DEM. LIX, § 40. ISOKR. XVII, § 14. Cf. LIPSIUS, p. 64 f.

Solon,¹ but it is characteristic that what may be called ordinary abuse was not punishable. Plutarch offers the very plausible explanation that it would have been out of the question to proceed effectively against every kind of angry utterance or retort; legislators must not attempt too much, and had better restrict their action to what is really important. Thus Solon forbade the levelling of abuse at the dead, or, as to the living, the indulging in it in certain specially protected localities—temples, tribunals, political assemblies. Certain particularly obnoxious terms of abuse, like *ἀνδροφόνος* or *πατραλοίας* were also actionable.² Magistrates were protected, by the severe threat of *ἀτιμία*, against any abuse. There is also a curious notice that it was illegal to reproach a tradesman with the exercise of his trade. Fines in these cases ranged from the trifling sum of five drachmae to heavier penalties.

Damage to
material
interests.

An action of great importance and very general application was the *δίκη βλάβης*, corresponding more or less to the action *ex lege Aquilia de damno injuria dato* of Roman law. It lay on two principal occasions: if some one had deliberately inflicted damage on the plaintiff, and if the plaintiff had been hurt or suffered damage by the act of a slave or animal belonging to the defendant. The first eventuality presented the simplest basis for a prosecution. It occurred, for instance, in a trial mentioned in Demosthenes' speech against Kallippos,³ in which it is contended by the plaintiff that the banker Pasion had paid out a certain sum sent to a wrong addressee contrary to the direction of a correspondent of his and to the detriment of Kallippos; or again in the case referred to in the speech against Pantainetos,⁴ who complained of the arbitrary distress practised by Nausimachos on Pantainetos' agent, with the result that Pantainetos was unable to acquit himself. It was natural in such trials that an intention to harm should

¹ PLUTARCH, *Solon*, 21 Ἐπαινῖται δὲ τοῦ Σόλωνος καὶ ὁ κωλύων νόμος τὸν τεθνηκότα κακῶς ἀγορεύειν. . . ζῶντα δὲ κακῶς λέγειν ἐκώλυσε πρὸς ἱεροῖς καὶ δικαστηρίοις καὶ ἀρχείοις καὶ θεωρίας οὔσης ἀγώνων' . . . τὸ γὰρ μηδαμοῦ κρατεῖν ὀργῆς ἀπαιδεύτων καὶ ἀκόλαστον' τὸ δὲ πανταχοῦ χαλεπὸν, ἐνίοις δ' ἀδύνατον' δεῖ δὲ πρὸς τὸ δυνατόν γράφεσθαι τὸν νόμον.

² LYSIAS, XI, 3, 4. Cf. LIPSIUS, pp. 649 ff.

³ DEM. III, § 14.

⁴ DEM. XXXVII, § 4, 22.

have to be proved in order to justify penal proceedings, and the principal point of dispute was therefore whether the damage had arisen accidentally or in consequence of spiteful intention. In the trial between Kallikles and the son of Teisias, Demosthenes for the defendant tried to prove that the damage done to the plaintiff's plot by inundation was not the result of any building operations carried out recently and intentionally on the estate of his client, but the consequence of accidental torrential rain rendered more noxious by certain acts of the plaintiff himself.¹ If compensation had to be paid at all, it ought to be paid, according to this defence, only in reparation of the material damage sustained, and not in double, as would be the case in a penal action.

In view of the stress laid on harmful intention, it seems doubtful whether a case like that against Boiotos, in which the plaintiff Mantitheos objected to the use of his name by the defendant, could be treated as a *δίκη βλάβης*.² In spite of the usual attempts to cast suspicion on the motives of defendants and to depict the consequences of the latter's success in the trial in the darkest colours, it seems to me that the juridical situation did not warrant any claim for compensation either penal *in duplum* or civil *in simplum*, although it gave ground for a controversy as to the use of the name—a *διαδικασία*—directed towards a result which would be obtained in English law by an injunction.³

The second group of *δίκαι βλάβης* was the subject of one of Solon's laws⁴ which treated of damage occasioned by four-footed animals. Dogs are especially mentioned in this connexion, but there can be no doubt that cattle and other domestic animals were covered by this rule. The responsibility of the master extended also to the acts of slaves.⁵ All these eventualities are discussed with many concrete details by Plato in the *Laws*, and we may safely

¹ [DEM.] LV.

² DEM. XXXIX.

³ Thalheim in the article on *δίκη βλάβης* in *R.-Enc.* III, 554 expresses a different view.

⁴ PLUTARCH, *Solon*, 24.

⁵ An oration on the subject was ascribed to Lysias.

suppose that he drew his precepts in this case from the practice of his native city.¹

Miscellane-
neous.

I have already had occasion to notice the strange fact that theft was considered to be a matter for private and not for public prosecution. In ordinary cases the sufferer brought a *δίκη κλοπῆς*, while the *γραφὴ κλοπῆς* was reserved for certain qualified transgressions, like stealing in a bath-house or in a court of justice.² This does not preclude the infliction of a fine on the thief: he had, as on some other occasions, to pay compensation in double, and half of the fine went as a penal payment to the city.

It seems even more strange from our modern point of view that false evidence in a trial at law gave rise not to a public but to a private prosecution. Such leniency was evidently suggested by similar considerations of policy as the impunity of ordinary abuse: false testimony was of too common occurrence to call for criminal prosecution in every instance.³ An attempt was made, however, to penalize false evidence treated as a profession. If some one was convicted three times in actions *ψευδομαρτυριῶν* he lost the right to tender evidence in a court of law. Otherwise that action was treated purely as an action in tort. A corresponding action lay against a person who had contrived the production of such false testimony. He was actionable by a *δίκη κακοτεχνιῶν*.⁴ Another penal action akin to the *δίκη ψευδομαρτυριῶν* was the prosecution for referring to witnesses who had not really been called in to testify to an action in law—*δίκη ψευδοκλητείας*.⁵ In this case again Athenian law entrusted the prosecution to the private person whose interests were directly affected by the false assertion.

¹ *Laws*, XI, 936.

² See above, p. 176.

³ Cf. LIPSIUS, p. 778.

⁴ DEM. XLIX, § 56. Cf. LIPSIUS, p. 783.

⁵ LIPSIUS, p. 446.

CHAPTER X

PROPERTY AND POSSESSION

1. *General Terms and Distinctions.*

THE essence of the law of property is the attribution to certain persons of exclusive rights of disposal over certain things. Modified and conditional rights are derived from this main position, and they will have to be examined in time, but the first thing to be ascertained in any given system of law is to what extent and on what basis things are attributed to persons as belonging to them or *owned* by them. It is evident at first glance that there are two aspects of the matter. Things may belong to me because I have made them or got hold of them; they may also belong to me because they have been granted or guaranteed to me by some community of which I am a member. In other words, ownership has been produced by private force in the shape of labour or occupation; it has roots also in public force in the shape of laws protecting certain interests as against other interests. For the sake of analysis it is useful to examine these various elements separately and one by one, but in reality social life always presents a combination of both tendencies. Such combinations vary greatly according to systems, and their characteristic turn depends to a great extent on the social type which serves as a basis for the particular legal system under investigation. The study of Greek jurisprudence is highly interesting from this point of view. Although it cannot be reduced to a series of simple deductions from the principle of city democracy, it gives this principle a prominence which greatly restricts and modifies all other influences bearing on the case.

The most striking feature of this formation is its contrast with the Roman treatment of the subject. Rome and Athens closely resembled each other in the initial stage of their

development as city federations of kindreds, but later on, with the growth of their imperial policy, they came in many respects to follow divergent roads. As to the problem under discussion, Rome developed the conception of absolute property for the citizen—the *dominium ex jure Quiritium*—while Athens worked out a conception of *relative* property rights (κυρίως κτῆσθαι or ἔχειν καὶ κρατεῖν).¹ It is significant enough that there is no Greek term corresponding to the *dominium* of the Romans. It has been conjectured that this is to be explained by the insufficient development in Greece of the rules as to occupation and usucapion. Under these circumstances, it is said, a Greek attempting to assert absolute ownership 'against the whole world' would have had to run the gauntlet of an endless string of references to one *auctor* after another, truly a *probatio diabolica*.² I must own that I fail to understand this line of reasoning: the Greek world traced property in a multitude of cases to definite acts of State—to the distribution of lots or to the public inscription of the tenure in the presence of witnessing officials,³ and nothing could have been easier than to assert absolute *dominium* at least in such cases—provided that absolute *dominium* had been recognized. In reality the point established was only a recognition of better right (καρτερόν εἶναι), and not of absolute right. And there was yet another point, not less important than the first—in all cases of allotment, official registration, adjudication, etc. the title of the proprietor was emphatically derived not from the assertion of private will (*hunc fundum meum esse aio ex jure Quiritium*), but from a concession by the city. The public element was clearly predominant, and this fact goes far to explain why occupation and usucapion did not come to play the part that they played in Rome.

Another term conspicuously vague in Greek law is the term οὐσία:⁴ it means fortune, patrimony, the complex of

¹ DITT. *Syll*³. I, 167. MITTEIS in *Z. SS. Rom. Abth.* XXIII.

² BEAUCHET, *Droit privé*, III, 53.

³ See, for example, the inscription of Halikarnassos, *I. J. G.* I, p. 4
καρτερός δ' εἶναι γῆς καὶ οἰκιῶν. οἵτινες, τότε ἔχον ὅτε Ἀπολλωνίδης καὶ
Παναμύης ἐμνημόνευον, εἰ μὴ ὕστερον ἀπεπέρασσαν.

⁴ Οὐσία, BEAUCHET, *op. cit.*, III, 367.

objects owned and held, but not the right of property. *Δίκη οὐσίας* means an action concerning the patrimony of a person or the interests of a person in certain objects, but it does not mean a *rei vindicatio* in opposition to a personal action. By calling attention to these peculiarities of legal terminology I do not wish to create the impression that the rules as to property in Greece were entirely built on a foundation of public law and disregarded the influence of individual will and interests. It is not necessary to rush to such absurd exaggerations in order to appreciate at their due value the importance of the public elements in the Greek legal system. It is well, however, to take stock from the very beginning of certain characteristic peculiarities in the use of juridical terms and in the general treatment of property in Greece.

Before examining in detail the juridical theory of property, let us ascertain what different species the Greeks distinguished within the generic conception of things belonging to persons. We are accustomed in modern systems to oppose real to personal property; or property in land, including houses, to chattels; or again, ancestral to self-acquired property. The first of these distinctions is connected with the mediaeval history of tenure and has no parallel in Greek law. The other two classifications are represented in somewhat modified forms in Greek law. Kinds of property.

The contrast between land and chattels and its bearing on legal rules is often noticed in the sources of the classical period. We read, for instance, in Isaios' speech on the inheritance of Kiron¹ that the latter possessed property of various kinds: land (*ἀγρόν*) worth a talent, two houses (*οἰκίας*) in the town, one leased, bringing in two thousand drachmae, the other, in which he lived, worth thirteen minae. Also slaves let out on hire (*ἀνδράποδα μισθοφοροῦντα*) and two maidservants and a girl; furniture (*ἐπιπλα*) used in the house, worth, with the slaves, thirteen minae; and property clearly ascertainable (*φανερὰ*) worth more than ninety minae; besides this considerable loans, from which he received interest. Aischines in his oration against Timarchos lays

¹ ISAIOS, VIII, § 35.

particular stress on the dissipation of various kinds of fortune by his opponent.¹ In these cases and in similar ones,² while the various elements of a person's fortune are enumerated, the principal place is naturally assigned to land and houses. The expression *ἐπιπλα*, used originally for furniture, came to be gradually extended to all sorts of goods kept in a house or on an estate,³ although cattle, slaves, and money were generally mentioned as separate categories of goods. Like the *familia pecuniarum* of Roman law,⁴ they were considered in Greek law from another point of view than land and houses.

Slaves as well as cattle and agricultural implements were often economically bound up with the cultivation of an estate, and the *instrumentum fundi* came to be considered in Roman law as a part of the *fundus* which could not be detached from it at random. There are definite indications of a similar view in Greek law, although it was not neatly reduced to a formula as in the French *Code Civil* under the heading of *immeubles par destination*. Plots are mentioned with some slaves connected with them, as for instance in Demosthenes' first speech against Aphobos.⁵ In the oration against Onetor Demosthenes tried to refute his adversary's contention that he held a certain estate in mortgage for his sister by showing that he had let his brother-in-law, Aphobos, denude the estate by removing the slaves and other elements of the *instrumentum* necessary to its cultivation.⁶ "He went off with all that he could carry away, the crops and the agricultural implements, all except the jars; but what he could not carry off he of necessity left behind, so that it is possible now for this man to claim the land itself." If it had been a dower estate he would have been careful to treat it like a provident *paterfamilias*.

An indirect, but most important indication as to the exceptional importance of land tenure is to be found in the prohibition of the acquisition of land (*ἐγκτησις*) by

¹ AISCH. I, 97 f.

² AR. *Rhet.* I, 5, 7; *Pol.* II, 4, 10.

³ MITTEIS. *Rom. Privatr.* I, p. 80.

⁴ DEM. XXVII, 35. Cf. XXXVII.

⁵ *Id.*, XXX, § 28.

⁶ Cf. ISAIOS, VI, 30.

foreigners. While the ports and markets of Athens were full of business men from all parts of the world, who bought and sold goods and entered into all sorts of contractual relations with citizens and among themselves, while denizens (*μέτοικοι*) formed one of the principal elements of the population of Attika, all these persons, fully safeguarded as regards money, goods, and conventions by Athenian law, were deprived of the right of owning land, except in certain specified cases. I have already had occasion to refer several times to the endeavours of autonomous allies of Athens to exclude the citizens of the capital city of the League from their respective territories.¹ The reason is obvious: each independent city was afraid of letting in foreign colonists and capitalists who might acquire undue political influence as landowners, and prohibitions against such invasions are generally coupled with promises that no foreign garrisons should enter the territory of free allied cities. It will be necessary later on to return to the prominent part played by land tenure in Greek law.

The distinction between ancestral (*πατρῶα*) and self-acquired (*ἐπίκτητα*) is not often made the text of definite declarations in Athens, but it played a conspicuous part in the law of Gortyn, especially in cases of dowry and divorce,² and it made itself felt in Athenian procedure by the wide scope of the action directed against spendthrifts. It was designated emphatically *δίκη κατά τινος περὶ τοῦ τὰ πατρῶα δεδωκέναι*, and there was sufficient material for such an accusation in the case of Timarchos, if the assertions of Aischines are to be believed even in part. The speaker declares that property of great value was left by the father of Timarchos—enough to warrant the undertaking of a *λειτουργία*—estates, skilled slaves, furniture, money on loan, and cites proof that Timarchos received this property and dissipated it.³ These facts point to another social aspect of

¹ See above, p. 159.

² *Code of Gortyn, I. J. G.*, §§ 14, 17, 36.

³ AISCH. I, §§ 96 ff. § 97 τούτω γὰρ κατέλιπεν ὁ πατήρ οὐσίαν, ἀφ' ἧς ἕτερος μὲν κἂν ἐλιτούργει, οὗτος δὲ οὐδ' αὐτῷ διαφυλάξαι ἐδυνήθη· οἰκίαν μὲν ὄπισθεν τῆς πόλεως, ἐσχατιὰν δὲ Σφηττοῖ, Ἄλωπεκῆσι δ' ἕτερον χωρίον, χωρὶς δὲ οἰκέτας δημιουργοὺς τῆς σκυτοτομικῆς τέχνης ἑννέα ἢ δέκα, ὧν ἕκαστος

property—to the economic and juridical connexion with family organization. Here again the ancestral character of the property could hardly be established except on the basis of land tenure.

One more distinction has to be noticed in connexion with management of property by the Greeks, namely the distinction between openly acknowledged (*φανερὰ*) and concealed property (*ἀφανῆς οὐσία*). Orators often use these terms,¹ but it is evident that they do not deal in such cases with juridical attributes, but rather with facilities for keeping one's wealth concealed in order to avoid the imposition of public services and taxation. It was easier to do so by placing one's capital in the hands of bankers or lending it out. Money was altogether less ostensible as an element of one's fortune than land, or houses, or workshops. These terms need not detain us any longer, as they reflect tendencies of economic management rather than legal peculiarities.²

2. *The Public Element in Property.*

Assignation.

In theory every private estate in Greece was considered as an allotment (*κλήρος, κλᾶρος*) assigned by the State. Nor was this theory a mere juridical fiction or antiquarian speculation. In the frequent cases of the swarming of colonies from some city (*ἀποικία*), the emigrants led by an *οἰκιστής* established themselves in their new home as *κληροῦχοι*. In the precious inscription bearing on the colonization of Brea in Thrace (about 444 B. C.) we read that the first act of the new settlers was to divide the land among themselves. Ten *γεονόμοι*—one from each Athenian tribe—marked off and distributed the lots; the temple and temple grounds which had belonged to the former inhabitants were to be taken over by the new settlers, but no religious estates

τούτω δὲ ὀβολοὺς ἀποφορὰν ἔφερε τῆς ἡμέρας, ὃ δ' ἡγεμὼν τοῦ ἐργαστηρίου τριώβολον ἔτι δὲ πρὸς τούτοις γυναῖκα ἀμοργὸν ἐπισταμένην ἐργάζεσθαι καὶ ἔργα λεπτὰ εἰς τὴν ἀγορὰν ἐκφέρουσαν, καὶ ἀνδρα ποικιλτήν, καὶ ὀφειλοντάς τινας αὐτῷ ἀργύριον, καὶ ἔπιπλα κτλ.

¹ E. g. ISAIOS, VII, § 35; DEM. XLVIII, § 12.

² Cf. BEAUCHET, *Droit privé*, III, 13.

were to be formed.¹ After the conquest of Chalkis 4,000 lots were formed;² after the conquest of Lemnos 3,000, of which 300 were to be dedicated to the gods.³ Plutarch has preserved in the biography of Perikles a list of colonies sent out from Athens in his age,⁴ and there can be no doubt that each citizen householder was assigned a plot of land by lot. By instituting his hearth in the plot he dedicated it to the permanent use of his family. The *ιστία* of the Lokrian colonists in Naupaktos was to remain undisturbed even if the new colonist changed his mind and went back to the mother city: he was obliged by law to leave a successor in the person of a grown-up son or of a brother. If he died without leaving near relatives, his hearth was kept for relatives living among the Epiknemidian Lokri of the metropolis.⁵

Nor was the assignation of landed property by the city a feature restricted to colonial institutions. The law of succession was not designated as *κληρονομία*, the heir as *κληρονόμος*, without valid grounds. The complex of estates in Attika was regarded in law as a set of *κληῆροι* distributed as far as possible permanently among a set of citizen households (*οἴκοι*), and the Archon Eponymos had to watch over this distribution and to guard against the disappearance of any of these ancient households.⁶ This principle went back to a period when kindreds and families were still ruled by tribal rather than by civic law, when the *κληῆρος*, like the *ἀρχαῖαι μοῖραι* of Sparta, was inalienable, and this aspect of their history will have to be considered at greater length later on. But the notion of the public character of the *κληῆρος* was expressed in many features of later law. The frequent use of confiscation as a means of repression in political struggles as well as in criminal justice gave occasion for constant reassertion of the eminent domain of the State. Take, for instance, the law of Iasos passed about 367 B. C. against the enemies of

¹ DITT. *Syll.*³, I, 67.

² HEROD. V, 77.

³ ED. MEYER, *Forschungen*, I, 13 ff.

⁴ PLUTARCH, *Per.*, c. 11.

⁵ *I. J. G.* I, xi, 180 ff.

⁶ AR. *Ath. Const.* I, 56, § 7.

Molossos, the satrap ruler of Asia Minor under Artaxerxes Memnon. Their estates were to be confiscated and sold by a numerous commission for the benefit of the city. A great part of the territory affected was distributed in lots (*κληῆροι*), the size of which seems to have varied in the course of successive adjudications. The validity of the bargain depended on its confirmation by *mnemones*—a kind of public notaries.¹ In another inscription—that of Mylasa,² connected with the same struggle between the cities of Asia Minor and the Persian authorities, the transfer of the plots is declared to produce complete ownership (*ἐκτῆσθαι κυρίως*). The officials charged with the duty of supervising dealings in land and of giving decisive testimony as to the attribution of plots (the *mnemones*) play a conspicuous part in the law of Halikarnassos on the restitution of estates to amnestied exiles.³ The practice of public registration of documents concerning land tenure assumed important dimensions,⁴ and made it possible to avoid many controversies. But although it helped to prove private rights, it detracted in no way from the prerogatives of the city, and made it much easier for officials to proceed when necessary to the application of sanctions against convicts or insolvent debtors.

Confisca-
tion and
expropria-
tion.

A most drastic intrusion of the State in the domain of private transactions is reported in an inscription of Ephesos. It commemorates measures of public safety decreed by the city authorities during the war against Mithridates (87 B. C.). The date is a late one, but the legislation mentioned in the inscription is entirely in keeping with the practice of Greek cities during the classical period—in fact it can be referred to as the closest parallel to Solon's celebrated *σεισάχθεια*, although it was called forth not by internal struggles, but by external danger.⁵ In a first law, passed in 87 B. C., all public debts contracted before the current year except those resulting from the farming of taxes or from mortgages made to colleges of priests were cancelled and the insolvent debtors liberated from the *ἀτιμία* into which they had

¹ DITT. *Syll.*³, I, 169.

² *Ibid.*, 167.

³ *Ibid.*, 45 (4th cent.), l. 20.

⁴ *The register of Tenos*, I. J. G. I, vii, pp. 64 ff.

⁵ *Ibid.*, I, iv, p. 23, l. 27 ff.

fallen. Private debts also were to be remitted without prejudice to the state of property rights in the year when the law was passed. A second law was passed in 85 B.C. authorizing a division of mortgaged estates between mortgagors and mortgagees by judicial arbitration¹ in accordance not with strict laws, but with equity.

No sweeping measure of this kind is known in the history of Athens after the reform legislation of Solon. In fact the heliasts are reported to have been pledged to swear an oath at their assumption of office not to advise or allow the repudiation of debts or the redivision of the land.² But the historians and orators of the fourth century tell us repeatedly that the people in its impoverished condition had recourse to confiscations and expropriations which were not justified in law, but helped to fill the treasury at the expense of wealthy citizens.³ A characteristic consequence of the protection afforded to interests derived from public sources is to be seen in the rule that the title of a person who had acquired property from the city could not be disputed under any circumstances.⁴ Those who thought that they had been unjustly deprived of land or houses by the city could contest the application of a decree of confiscation or expropriation, and a *διαδικασία* might arise in consequence of such a protest, but even if it were proved that the city authorities had been in the wrong the property transferred by them to private owners (*δημόπρατα*) remained in the hands of those who had acquired it from the State, while the latter had to compensate those who had incurred the loss through an error of the magistrates.⁵

It ought to be noticed in this connexion that there was no distinction in principle between State domains and property of temples. The latter was considered a special class of public property. In ordinary circumstances the gods, for instance Athene in Athens, received their proportionate share, but the rules and administrative practices obtaining in the temples were subject to supervision and

¹ *I. J. G.* I, v, pp. 30 ff.

² HERMANN-THUMSER, II, 377.

³ XENOPHON, *Resp. Ath.*

⁴ DEM. XXXVII, § 19.

⁵ BEAUCHET, *Droit privé*, III, 31.

revision by the people.¹ Goods and land, though kept together from reasons of provident economy, were in no way *extra commercium*, and could be sold or mortgaged if necessity required.² Above all, the city could fall back on the wealth of the temples in extreme emergencies, and Athens, for instance, had recourse to them in the critical period of the Peloponnesian war. Expropriation for the sake of public utility was admissible in the case of temple goods, and there are recorded cases of it.³

Archaic
features in
City law.

I have abstained hitherto from discussing the lingering influence of tribal institutions on the law of the classical period. But it would be impossible to omit a reference to the law of succession; it proves that certain fundamental rules obtaining in the fifth and in the fourth centuries were derived from the archaic customs of an epoch when the Greeks lived in kindreds loosely knit together around tribal centres. Guiraud has said with some reason that land tenure was created not by the city, but by the family groups of older ages.⁴ He ought to have added that these family groups were themselves political associations, and therefore units of public law, and not merely the private combines of relatives which we usually have in view when we speak of families and kindreds. It is even more important to make up our mind from the outset as to the part played in family economy and law by the religious element. Fustel de Coulanges' famous campaign against primitive collectivism hinged on the view that early land law was governed by principles derived from the cult of ancestors. Private ownership, according to this theory, arose specifically from the appropriation of plots of land for family burial grounds, and the main purpose of succession was the continuance of rites and sacrifices in honour of deceased ancestors, the shrine for these rites being connected with the household hearth. Both Guiraud and Beauchet have accepted this theory and developed it further by distinguishing between the family root and the religious root of pro-

¹ E. g. DITT. *Syll*³. I, 94. See above, p. 112.

² BEAUCHET, *op. cit.* III, 39.

³ Delos accounts are referred to by HOMOLLE, s.v. *Donarium* in DAR. et S. III, 331.

⁴ GUIRAUD, *La Propriété foncière à Athènes*, pp. 1 ff.

perty and succession.¹ I submit that when the religious source is separated from the family interests of which it is the symbol, it loses its material meaning and remains, as it were, in the air, as a mystic doctrine which might have satisfied priests and superstitious clients looking out for supernatural guidance, but could hardly have formed the core of almost universal folklore. If, on the other hand, we were to hold to Fustel de Coulanges' notion of a cult creating positive laws and private economics, we might be accused—and, I think, with much reason—of setting things upside down, treating causes as effects, and *vice versa*. It requires a more vivid imagination than is generally possessed by scholars nowadays to accept the view that men appropriated fields not for the sake of the harvest, but because they had buried their parents in some part of the compound. A pasture and a tilled field have their own *raison d'être* for men in all ages, and the only question to be decided is, how far the use of a piece of land by one set of persons is compatible with its use by other sets of persons. In the solution of this problem considerations of defence, of co-operation, of capital outlay, certainly play a great part, and the religious sanctification of the relations arising on the land, although by no means a negligible factor, serves chiefly to embody and to vivify group conceptions which would otherwise remain abstract and utilitarian. As in the case of the State, the corporate life of the household, the kindred, and the tribe tends to present itself in concrete forms of hero-worship, of ancestral cults, of the tradition of the hearth. In this way there is no reason either to oppose the religious source of land law to the familial, or to subordinate the latter to the former.

We have an exceptionally favourable opportunity for reconstituting the leading principles of the Greek law of property at the early stage of city life, when they had ceased to follow tribal habits of settlement, but had not yet thrown off legal rules derived from the powerful influence of organized kindreds. This opportunity is given by the Code of Gortyn, which affords insight into the

¹ GUIRAUD, pp. 29 ff.; BEAUCHET, III, 68 f.

customary law of the outgoing sixth century. To be sure the Code treats of Kretan Dorians, but the institutions which it describes and implies are to be met with in a similar, though not so complete a form, among Ionians and Aiolians. Indeed, their study is indispensable if we want to understand the somewhat fragmentary accounts of the state of Attika before Solon.

Now, while the Code of Gortyn describes a perfectly developed system of property in movable goods, with carefully drafted rules as to the rights of husband and wife, father, mother, and children, in the clauses dealing with divorce, dower, succession, partition, we find the land holding (*κλᾶρος*) excepted from the operation of these rules. Sheep, cattle, dress, ornamental objects, and other movable goods are to be partitioned among the heirs, the sons taking the town houses and cattle and two-thirds of other goods, and the daughters one-third of the latter.¹ We learn from clauses dealing with eventual difficulties in partitioning articles of a perishable nature, or of a nature that does not admit of division by number, that failing agreement the judges had power to decide to whose share they should be consigned.² What is more, in some cases the successional mass of goods might be sold with a view of dividing the sum obtained as price.³ The town houses were evidently included in the processes of partition and sale, but the rural holding cultivated by serfs (*Φοικῆες*) is distinctly excluded,⁴ and remains unaffected by the change of ownership. Such difference between town property on one hand and rural holdings on the other was, of course, connected with the subjection of a population of rural serfs to Doric masters. The *Φοικῆες*—or *κλαρῶται*, as Hesychios calls them—were attached to the holdings for their cultivation and the payment of fixed dues to the masters. The whole system of rural exploitation was regulated by public

¹ *I. J. G.* I, xvii, p. 366, § 26 Ἡ δὲ κ' ἀποθάνῃ τις ἴεγαις μὲν τὰς ἐν πόλει κ' ἄ τί κ' ἐν ταῖς ἴεγαις ἐνῆι, αἷς κα μὴ Φοικεὺς ἐν Φοικῆι ἐπὶ κῶραι Φοικίων, καὶ τὰ πρόβατα καὶ καρταίποδα, ἄ κα μὴ Φοικέος ἦι, ἐπὶ τοῖς νιάσι ἡμεν, τὰ δ' ἄλλα κρήματα πάντα διαθήθῃαι καλῶς, καὶ λαγκάνεν τὸς μὲν νίους, ὁπόττοι κ' ἴωντι, δύο μοίρας Φέκαστον, τὰ δὲ θυγατέρας, ὁπότται κ' ἴωντι, μίαν μοίραν Φεκάσταν.

² § 33.

³ § 34.

⁴ § 26, see above.

law and not dependent on the vicissitudes of private prosperity or misfortune. Some features of this dualistic ownership are worth special notice. The Code of Gortyn reckons with the possible absence of heirs succeeding on the strength of relationship, however remote, and calls in this case the *φοικῆες* to succession—a most remarkable recognition of the tenant right of the latter.¹ On the other hand the class of goods treated in the same way as town houses extends to cattle and sheep as well, and therefore some margin must be left for the use of pasture-land besides that distributed among the holdings. In the minute regulations about the marriage of heiresses (*πατριῶκοι*) the attribution of chattels and of proceeds (*καρπῶ*) is determined in connexion with all sorts of eventualities, and the general aim of the law is certainly to prevent as far as possible the dispersion of family property. But the *κλῆρος* is never mentioned, and it is evident that the heiress and the agnate whom she is expected to marry are only concerned with the income or proceeds, but not with the property of the holding.²

A curious corroboration of the tribal character of early Doric land tenure may be found in an Argive inscription of the seventh century B. C. discovered on the site of the Heraion, the common sanctuary of the cities of Argos, Tiryns, and Mykenai.³ It treats of the consequences of a crime committed by a person and visited by the penalties of banishment and confiscation. The latter concerned the goods (*πάματα*) of the culprit, not his plot, and even these goods were not sold indiscriminately to any one who offered a good price for them, but either to the magistrates of the city or to the members of the kindred to which the fugitive belonged.

¹ *I. J. G.* I, xvii, p. 368, § 31 αὶ δὲ μὴ εἶεν ἐπιβάλλοντες, τῆς φοικίας οἰτινές κ' ἴωντι ὁ κλῆρος, τούτους ἕκεν τὰ κρήματα.

² *Ibid.*, pp. 376 ff., § 46 ἐπὶ τῷ πατριῶκοι ἤμεν τὰ κρήματα πάντα καὶ τὸν καρπὸν πρεῖν κ' ὀπινη. (Cf. § 45.)

³ *American Journal of Archaeology*, Second Series (1901), edition and commentary of J. Dennison Rogers. Cf. First Series (1894), article by Prof. Wheeler. The term *πάματα* can hardly be interpreted otherwise than as "goods"; in early law it seems to have corresponded to the *familia pecuniague* of Roman custom. The *ἑστισπᾶμων* was the head of the Doric household entitled to legal marriage and to the administration of family goods and interests.

Only if none of these wished to acquire them, might they be disposed of by auction conducted by the tribe of the Hyllaeans.

The law took a different shape in Athens, where there was no social substratum similar to the *φοικῆες* of Krete or the *penestae* of Thessaly. The condition of affairs obtaining before the reform of Solon might conceivably have developed into something analogous, if the Attic *θηῆτες* had been reduced into a state of subjection regulated by the city. Solon's reform, however, prevented this and led to the individualization and the mobilization of landed property. Before considering its results let us attend for a moment to the epoch immediately preceding the reform. It is not necessary to dwell on the well-known economic features of the situation clearly outlined in the sources and commented upon innumerable times by modern historians.¹ It is obvious that the main cause of the wretched state of the peasants was want of capital and their consequent dependence on those who for some reason did possess money or stock and could lend them at high interest. What is particularly noticeable from our point of view is the inability of the peasantry to repay debts by alienating part or the whole of their land. The *κλήρος* of the Athenian peasant was as inalienable as the *κλᾶρος* of the Doric tenants (*φοικῆες*). It could not be given, sold, or bequeathed out of the family course of tenure. This being so, nothing remained but to pledge income and labour, and these pledges took the shape of ever-accumulating heaps of recognizances in stone. Five-sixths of the income had commonly to be surrendered in this way, while personal indebtedness might end in the sale of the debtor out of the country or in his reduction to the status of a hand labourer, a *thes*.²

The cure adopted by Solon was not only a drastic reduction of the burden of debts by subtracting interests paid from the capital owed, and the remission of a certain quota of the loan, but also the introduction of limited free trade in land. It is this latter feature which concerns us imme-

¹ See, e.g. MEYER, *Gesch. des Altertums*, II, § 401 ff.

² PLUTARCH, *Solon*, c. 16; AR. *Ath. Const.*, c. 12.

diately. Unfortunately we are not told to what extent the heavily indebted peasants threw their farms into the market in order to achieve their liberation, but it is evident from the economic state of Attika in the sixth and fifth centuries that the social struggle went on for a good while even after the opening of the market in land, and that it is only thanks to the unexpected outlets created by the Persian wars and the policy of State colonization that Athens succeeded in attaining for a time a certain equilibrium between her agrarian and her commercial relations. Anyhow, the legal basis for this ulterior development had been created by the reform of Solon, and it remains for us to notice that in spite of its radicalism it did not do away with some traces of the previous archaic order. The most characteristic of these traces are to be found in the law of succession and in arrangements of family property dependent on it. Solon's legislation recognized the *ἐπίκληρος*, the heiress who serves as a link for the transfer of the family holding to the nearest agnate. Her position is often discussed in the speeches of the pleaders,¹ but the details supplied by them can add nothing to the minute regulations of the Gortyn Code in familiarizing the modern student with this particular device for preventing the dispersion of the *κληρος*. Intestate succession takes its course, exactly as in Krete, on the lines of successive *parentelae*—the descendants of the deceased coming first, the males having precedence over the females; then come the descendants of the father of the deceased, that is, his brothers and nephews (eventually sisters and nieces): in the third rank the descendants of the grandfather, that is, uncles, cousins, and sons of cousins, with the corresponding female relatives behind them. This closes the *ἀγγιστεία* or narrow circle of relatives, and leaves the way open to succession according to relative proximity of degree.² Partition and sale may supervene and break up the actual estates into new plots, and evidently no kind of regularity could be traced in the distribution of the soil, say in the time of Perikles. But the public supervision of the *κληρος*

¹ E.g. ISAIOS, III, 31, 2; 65, 7; VIII, 31, 4, 5.

² DEM. XLIII, § 51.

was never abrogated, and the Archon Eponymos continued to perform onerous duties in connexion with the marriage of heiresses, the appointment of guardians, the introduction of new blood by adoption in cases when a household was threatened with extinction. In this way, although a specific law of Solon limiting sale and acquisition of land has only left a vestige of its existence in an obscure sentence of Aristotle's *Politics*,¹ the general tendency of Athenian democracy to preserve the family holdings as economic and religious units is sufficiently indicated. The recognition of the household estate as the normal basis of social life and of juridical relations finds expression also in some of the laws concerning testaments. In the early or tribal period the institution of a stranger to take the place of a natural heir was effected by adoption, and this method remained in common practice even after the introduction of direct testament. It was quite usual for a dying man to adopt some one on the condition that he should marry his daughter or even his widow.² Solon gave leave to bequeath property by will, but on the condition that there were no children and that the testator were in his sound mind and not under undue influence.³ Thus a certain family solidarity asserted itself even in cases of disposal of property by will.

Altogether it may be said that although democratic cities gave a wide scope to individual will and private interests, they never lost sight of the public element of ownership and allowed it sometimes to manifest itself in a manner quite foreign to our own notions and habits.

3. *Private Appropriation.*

Occupation.

The assertion of private power over things assumed a different character in Greek and in Roman law. While the Roman agriculturist stubbornly asserted his right to a field which he had occupied for cultivation, in Greece private enterprise was mainly exercised by the trader,

¹ AR. *Pol.* II, 4, 12. Glotz (*op. cit.*) tries to explain away this reference, but as it seems to me without convincing reasons.

² DEM. XXVII.

³ DEM. XLVI, § 14; XLIV, § 68; ISAEOS, II, § 13; VI, § 9.

while peasants rarely detached themselves from their fellows in the kindred or the colonizing group. As a result, occupation of land as an act of private force is hardly mentioned in Greek legal sources, while appropriation of chattels is noticed and recognized as a juridical source of property. Aristotle calls it the natural source of property in regard to the proceeds of hunting and fishing.¹ The domestication of bees also gave rights to the person who had tended the insects on his ground and arranged skeps for them. As for goods acquired by means of trade, it was sufficient to establish title by referring to the original seller or producing a receipt of his as regards the sale.² This was, however, only a means of proof, and not absolutely necessary to establish title. In fact, although the famous rule of the Code Napoléon—"en fait de meubles la possession vaut titre" (Art. 2279)—was not proclaimed in as many words, a very short period—one year—was sufficient to protect the possessor against litigation, and as a matter of fact we do not read in any of the speeches that have come down to us of any disputes arising from uncertainty as to title in the case of chattels.

This is different in regard to land, but the position there is peculiar when compared with Roman law. It is well known what an important part was played by acquisitive prescription or usucapion in the latter system.³ It served to justify title arising out of mere occupation, and was often used by the praetors to avoid the cumbersome technicalities of acquisition *jure Quiritium*. Now, acquisitive usucapion is never mentioned as a legal source in Greek law. True, in a speech of Isokrates dealing with the claims of Sparta to the possession of Messenian territory the orator urges as a recognized maxim the view that possession lasting many years establishes ownership,⁴ and it will not do to challenge this text on the ground that it deals with a purely international dispute.⁵ Isokrates has taken care to point out

Usucapion
and pre-
scription.

¹ AR. *Pol.* I, 3.

² Notice e.g. the proposal of Protos in Demosthenes' speech against Zenothemis.

³ BUCKLAND, *Text-book of Roman Law*, 244, 386 ff.

⁴ VI, § 32 πρὸς δὲ τούτοις καὶ τῷ πλήθει τοῦ χρόνου.

⁵ BEAUCHET, *Droit privé*, argues in this sense.

that the principle in question obtains both in public and in private law. But, on the other hand, as the reference is couched in general terms and bereft of any specific determination as to a number of years—say thirty, or twenty, or ten—it appears rather as an appeal to equity than as a definite rule of usucapion. It is also characteristic that the question of good faith does not arise in any of the trials known to us, while it could hardly have been passed over in any system attaching importance to acquisitive usucapion.

On the other hand there is a certain number of instances in which a defence is opposed to claimants on the ground of what may be termed limitation of actions, that is, prohibition to initiate a trial when a considerable time has elapsed since the occurrence of the fact complained of. A *προθεσμία* of this kind limited to five years is mentioned in connexion with actions of debt and of accounts of guardians.¹ As to pleas of land the evidence is confused and does not admit of a clear solution. There are some passages which seem to suggest the conclusion that the *προθεσμία* of five years was applied also in trials as to landed property, the most important reference being that of Isaios in the speech on the succession of Pyrrhos, in which it is said expressly that the law puts a term of five years to claims of adjudication as to inheritance.² But the reference is complicated by the adjunct that this term is running not from the death of the original owner but from that of his first successor. That these enigmatic words are not the result of some copyist's blunder may be gathered from the fact that in well-known instances the trials to which extant speeches belong took place some twenty or twenty-two years after the death of the first *de cuius*. This was the case with Isaios' clients in the trials as to the succession of Pyrrhos and of Dikaiogenes.³ As for Demosthenes, he meets the reproach that an action has been brought late⁴ by the observation that his opponent should

¹ DEM. XXXIV ; XXXVIII, § 17.

² ISAIOS, III, § 58 ὁ δὲ νόμος πέντε ἐτῶν κελεύει δικάσασθαι τοῦ κλήρου, ἐπειδὴν τελευτήσῃ ὁ κληρονόμος.

³ *Id.* III and V.

⁴ DEM. XLIII, § 16.

not complain of having been left unmolested for a long while, but rather attend to proving his right. A rhetorical counter-thrust of this kind does not help much to clear up doubts; the only inference that one is able to draw from it seems to be that there was no legal prohibition against taking action after long delay, although one would expose oneself thereby to unpleasant retorts on the part of the man in possession. The speech of Isaios on the succession of Aristarchos presents a similar situation. It is not denied that the plaintiff's father abstained from bringing an action when the inheritance was taken over by the brothers of the deceased because he did not want to be separated from his wife, the only remaining daughter of Aristarchos, who might otherwise have been claimed as an *epikleros* by one of these brothers.¹ Afterwards there were other delays occasioned by service in the Korinthian war, and by other untoward circumstances. Yet in spite of considerable procrastination Isaios' clients did eventually bring an action.

When we put all these fragmentary notices together, it seems that we have to formulate two main conclusions: (1) any exception based on prescription could only be pleaded against the successor of the original heir; this may be a consequence of the fact that in the first instance the adjudication was made by an *ἐπιδικασία* which could not be met by a *παραγραφή* if the claimant made out a *prima facie* case before the archon. The appearance of new claimants, relying on new evidence, could thus lead to a number of trials concerning the same inheritance. (2) When the right of a first heir had not been contested, or he had succeeded in defeating his opponents, his successor derived additional security from the fact that his *de cuius* had maintained himself, and in strict law an exception by *προθεσμία* was allowed to him after five years' possession.²

¹ ISAIOS, X, § 19 ὁ γὰρ πατήρ οὐμὸς ἐπὶ προικὶ ἐγγυησάμενος τὴν ἐμὴν μητέρα συνώκει, τὸν δὲ κληρὸν τούτων καρπουμένων οὐκ εἶχεν ὅπως εἰσπράξειτο. ὅτε γὰρ περὶ αὐτοῦ λόγους ἐποιήσατο τῆς μητρὸς κελευούσης, οὗτοι ταῦτα αὐτῷ ἠπέλιθσαν, αὐτοὶ ἐπιδικασάμενοι αὐτὴν ἕξειν, εἰ μὴ βούλοιο αὐτὸς ἐπὶ προικὶ ἔχειν. ὁ δὲ πατήρ, ὥστε τῆς μητρὸς μὴ στερηθῆναι, καὶ δις τοσαῦτα χρήματα εἰασεν ἂν αὐτοὺς καρποῦσθαι.

² *Id.* III, § 58.

However, it seems that this rule was not always followed by the heliastic Courts, and there were occasions when vindication of property remained open to claimants even after the five years of the *προθεσμία* had elapsed.¹ Such deviations from strict law were by no means uncommon in the practice of the Athenian Courts. In any case, even if we admit the operation of a certain procedural exception on the ground of a statute of limitations, the fact remains that acquisitive prescription or usucapion was unknown to the law of the classical period and this is a most important feature in the jurisprudence of the Greek city. Procedural limitations correspond to one set of social requirements and usucapion to an entirely different one. In the first case the object is to put an end to vexatious demands and to fraudulent devices of pettifoggers. This is why the limitations are so prominent in claims as to debts in which the defendants cannot fall back on any assertion of title. Usucapion, on the other hand, proceeds from the recognition of an acquisitive value in protracted possession. It arises naturally in situations in which a number of persons hold the soil without any other title but occupation and use, but eventually claim protection for their tenure on the strength of long user. While this juridical process is definitely recognized by Roman law with its various forms of occupation, it is not apparent in Greek law, at any rate in the period of the classical city; and the reason for this stunted development has to be sought, it seems, in the tendency of Greek law to derive title to land either directly from allotment (*κληρονομία*) or from transfer by conveyance. Under this last head the practices of registration and warranty² deserve special notice, although they are too technical to form the subject of discussion in a work dealing with principles of jurisprudence.

Cultivation as a source of land tenure.

There is, however, one group of rules in Greek law, in which the influence of men's labour—of the exertions and enterprise displayed by them for purposes of culture—is

¹ This is particularly suggested by the case of *Dikaiogenes* (ISAIOS, V, 7, 37). See on the subject E. CAILLEMER, *Études sur les antiquités juridiques d'Athènes*, no. 7 (1869).

² Οἱ βεβαίωσις see e.g. DEM. XXXVII, § 12.

recognized as generating real rights, although these rights do not reach the standard of full property. I mean the growth of protected tenant right on territories reclaimed from the waste. While land bearing fruit (*καρποῦσα γῆ*) appears in the market as a commodity subjected to the common law of leases, barren soil (*γῆ ψιλῆ*) requires an entirely different treatment. In the later law of the Empire the exploitation of such plots was termed *ἐμφύτευσις*; in the classical period of the Greek city this generic term was unknown, but the relations that corresponded to it existed and gave rise to important juridical consequences.

Although the most characteristic particulars are presented by the treatment of deserted or barren plots, the evidence to be examined is mainly derived from leases made by temples and priestly colleges which included soil of different quality. One of the best examples is that of the fourth-century leases of Heraklea in southern Italy.¹ Certain lands belonging to Dionysos were measured and divided into lots (*μερίδες*) by surveyors in execution of a decree made by the people of Heraklea in a regular assembly (*ἐν κατακλήτῳ ἀλίᾳ*). The proportion of cultivated land to wild grounds may be illustrated by reference to the first lot, which contained 201 schoinoi of arable land (*ἐρρηγεία*) and 646½ schoinoi of untilled (*ἀρρήκτω*) covered with wood.² Some 700 schoinoi had been appropriated by outsiders and recovered by summary actions before the tribunals (*ἐγδικαξαμένοι δίκας τριακοσταίας*). Both the recovered territory and the other grounds belonging to Dionysos are leased for life (*ἐμισθώθη ἅ γὰ κατὰ βίω*) for a yearly rent of some measures of corn.³ Although the term of the lease is nominally during lifetime, the conditions of the subjoined contract as to the lands of Dionysos show that a lease in perpetuity was intended. In the first clause it is specified that the tenants are to hold their plots for ever, provided they supply the securities required and pay their yearly rent.⁴ The third clause of the contract lays down that if

¹ *I. J. G.* I, xii, pp. 195 ff.

² *Ibid.*, p. 196, § 3, cf. § 7. The total of cultivated land amounted to 1,095 schoinoi, of uncultivated to 2,225 schoinoi.

³ *Ibid.*, § 9.

⁴ *Ibid.*, p. 200, § 1.

the tenants sublet the plots to third persons, bequeath them by will, or sell the right to collect the fruits, the assigns, legatees, or purchasers are bound to provide securities in the same manner as the original tenants.¹ Besides the payment of the moderate rent in kind, the lessor is required to plant a certain number of vinestocks and of olive trees in proportion to the size of the plot. If he declares that the soil is not appropriate for the culture of olives, experts are to report to the popular assembly after having made a comparison of the soil with that of neighbouring plots. Every fifteen years the *polianomoi*, together with ten citizens chosen from among the people, have to examine the progress of the plantations, and those tenants who have not carried out their obligations incur a corresponding fine.

The beginning of a similar record has been preserved in regard to the lands of Athene Polias,² which had been partly invaded by private settlers, and had to be reclaimed. The greater portion of the lots are described as *γη ψιλῆ*, while the rest consisted of valuable plantations.

The particular points mentioned in the Heraklea leases receive further elucidation from inscriptions found on the sites of Thisbe (Boiotia), Olymos, Mylasa, etc.³ For our present purpose it is important to note that special rights approximating to ownership were conceded to leaseholders in order to improve cultivation. In some cases the emphyteutic condition must have originated in downright occupation by outsiders.⁴

4. *Rights and Remedies in Land Law.*

Self-help.

Certain claims were considered by the Greeks to be so self-evident that those who asserted rights under them could proceed to put themselves into possession by their own private action, without any warrant or decree of judicial or administrative authorities. Such a situation

¹ *I. J. G. I.*, xii, 202, § 3, ll. 105-8 καὶ αἱ τινὶ κα' ἄλλῳ παρδῶντι τὰν γᾶν, ἂν κα' αὐτοὶ μεμισθωσῶνται, ἢ ἀρτύσωντι ἢ ἀποδῶνται τὰν ἐπικαρπίαν, ἂν αὐτὰ τὰ παρῆξόνται πρῶγγύως οἱ παρλαβόντες ἢ οἱς κ' ἀρτύσει ἢ οἱ πριαμένοι τὰν ἐπικαρπίαν, ἂν ἂ καὶ ὁ ἐξ ἀρχᾶς μεμισθωμένος.

² *Ibid.*, pp. 213 ff.

³ *Ibid.*, pp. 253 f.

⁴ MITTEIS, *Zur Geschichte der Erbpacht im Alterthum in Abhandl. der k. sächs. Gesells. der Wissenschaften*, XX, no. 4 (1901).

arose in three cases. After the death of a person his sons entered (*ἐμβατεύειν*) into the inheritance *ipso facto*,¹ in accordance with the view that they had been joint owners with their father. They were *heredes sui* in Roman law, and in old French law the same principle was expressed by the maxim "le mort saisit le vif". This continuation of "seisin" on the part of sons and of their male descendants extended also to sons by adoption, if the latter had been adopted in the lifetime of the father, but not in the case of adoption by testament.²

The second eventuality when *ἐμβάτευσις* was admitted by law arose from hypothecary obligations. If a debtor, who had obtained a loan under hypothecary security, had not made payment in time (*ὑπερήμερος*) the gage was liable to be seized without further formalities by the creditor. A case in point is that mentioned in the speech against Apaturios, where the creditor seized a ship by *ἐμβάτευσις*.³ Thus by law a hypothecary mortgagee was assimilated to a *heres suus* and allowed to proceed to execution by his own hand.⁴ We have to distinguish from this case the execution which might take place against any insolvent debtor, as the property of the latter might be considered as a general security for the repayment of debts. In that case execution would proceed from a judgement or the order of a magistrate, unless there was a preliminary agreement that the creditor had the right to take steps to satisfy his claim by distress.⁵

Property pledged as a security for the payment of a dowry was deemed by Greek law to be safeguarded by hypothecary right, so that the husband or, eventually, the *κύριος*, of a woman could seize it in satisfaction of her claim.

¹ ISAIOS, III, § 59 ἀκριβῶς γὰρ ἐπιστάμεθα πάντες ὅτι ἀδελφῶν μὲν κλήρων ἐπιδικασία πᾶσιν ἐστὶν ἡμῖν, ὅτῳ δὲ γόνῳ γεγῶνασι γνήσιοι παῖδες, οὐδενὶ ἐπιδικάζεσθαι τῶν πατρῶων προσήκει.

² *Ibid.*, § 60 καίτοι . . . ὅσοι μὲν ἂν καταλίπωσι γνησίους παῖδας ἐξ αὐτῶν, οὐ προσήκει τοῖς παισὶν ἐπιδικάσασθαι τῶν πατρῶων· ὅσοι δὲ διαθήκαις αὐτοὶ εἰσποιοῦνται, τοῖσι ἐπιδικάζεσθαι προσήκει τῶν δοθέντων. τοῖς μὲν γὰρ, ὅτι γόνῳ γεγῶνασιν, οὐδεὶς ἂν δήπου ἀμφισβητήσειε περὶ τῶν πατρῶων, πρὸς δὲ τοὺς εἰσποιήτους ἅπαντες οἱ κατὰ γένος προσήκοντες ἀμφισβητῆν ἀξιούσιν.

³ DEM. XXXIII, § 6.

⁴ BEAUCHET, *op. cit.*, III, pp. 262 ff., seems right on this point against GUIRAUD, p. 228.

⁵ DEM. XLI, § 5.

The third eventuality in which seizure by self-help was allowed arose from the execution of a judgement: procedure by distress was rendered necessary in this case because the city was altogether disinclined to use its power of administrative coercion. As regards public prosecutions it relied, as we have seen, mainly on accusations by individual citizens; in the same way, it had not the time or the means to employ bailiffs to enforce decisions of tribunals in civil cases. Usually the winning party took steps on his own account with the eventual recourse to a *δίκη ἐξούλης* if he was refused satisfaction by the loser. This reserve of an action against a condemned party who prevents execution was the principal means of insisting on the satisfaction of one's rightful claims. Before turning to a closer examination of this form of procedure let us first mention some other methods of asserting rights to property.

Action in
vindica-
tion.

By the side of self-help by *ἐμβάτευσις* stood in the case of claims to inheritance the *ἐπίδικασία*. If there were no male heirs in the direct line and the deceased had not adopted a son during his lifetime, the succession was declared to be open to adjudication (*ἐπίδικος*). If a son had been adopted by the deceased by testament, his claim had to be tested in connexion with the question as to the state of mind of the testator and his freedom from corrupting influences.¹ In the absence of sons, daughters had the first claim, as *ἐπικληροί*, and the adjudication bore on the recognition of their right together with a decision as to which of the agnates should receive them in marriage (*ἐπίδικασία ἐπικλήρων*).² If none of these claims could be produced, the relatives could urge their claims on the strength of comparative proximity of degree and other circumstances.³ The adjudication was announced by a public declaration, made by a herald, calling upon all pretenders or opposers to come forward before the Archon and to state their claims or to contest the claims of others

¹ ISAIOS, VI, § 9. See on succession CALLEMER, *Le droit de succession à Athènes*.

² ISAIOS, VI, § 14 ὡστ' οὐτ' ἐπιτροπεύεσθαι προσῆκε τὴν Καλλίππην ἔτι, τριακοντούτῃν γε οὖσαν, οὔτε ἀνέκδοτον καὶ ἄπαιδα εἶναι, ἀλλὰ πάνυ πάλαι συνοικεῖν, ἢ ἐγγυηθεῖσαν κατὰ τὸν νόμον ἢ ἐπίδικασθεῖσαν.

³ DEM. XLVIII, §§ 22 ff.

(ἀμφισβητεῖν).¹ The adjudication turned entirely on the question of comparative right, and did not settle the problem in a final and absolute manner. If a pretender appeared on the scene who had not previously tried his chance, or if one of the parties concerned entered a plea in error in regard to the conduct of the ἐπιδικασία, the lists were reopened and a διαδικασία took place. The Demosthenic speech against Olympiodoros gives an example of such vicissitudes, while the speeches of Isaios on the estate of Hagnias and Demosthenes against Makartatos and against Leochares present a lively picture of the complicated claims and counterclaims among which archons and tribunals had to pick their way towards solutions. The principal feature of the procedure by ἐπιδικασία and by διαδικασία was that there were no plaintiffs and no defendants, but parties to a controversy seeking a judicial declaration of right. There was, however, in so far a difference between the two varieties of controversy that in the case of a διαδικασία after adjudication the opponents of the persons who had obtained possession had to make a considerable deposit (προκαταβολή) amounting to one-tenth of the inheritance in dispute. The fairness of this requirement was obvious, as otherwise there would have been no limit to the attempts to get hold of profitable estates.

The διαδικασία of inheritance is the species of adjudication most copiously illustrated in our sources, but it is only one species of a wide genus. Caillemet defined this kind of procedure in the following words: the attribution of a right or of a charge to a person designated by the judge from among two or more persons who assert that they are entitled to the right or to exemption from the charge.² It is quite distinct from an action (δίκη) or from the rendering of accounts (εἴθυνα).³ It amounted to a declaration of better right,⁴ or relative right as between several persons; and in so far it established a prejudicial situation which might be appealed to in case of any further dispute between the

¹ Dareste refers the expression to pretenders; Lipsius gives it a wider meaning (p. 582).

² CAILLEMER, s. v. *diadikasia* in *DAR. et S.*

³ *DEM.* XXIV, § 54; XX, § 147.

⁴ Cf. the *ius merum* of the English writ of right.

parties.¹ Besides the class already discussed—the *διαδικασία* as to inheritance—we have to note decisions as to citizens liable to be charged with some public duty or payment, like a trierarchy, the training of a chorus, or as to the inscription of a particular person on the roll of public debtors.² Again, if a premium had been offered for the denunciation or capture of a criminal and several Athenians claimed to have offered the information required, the selection of the one entitled to receive the premium was the result of a *diadikasia*.³ A dispute between claimants to a priesthood or some income connected with a sacerdotal office was conducted on similar lines of procedure.⁴ One of Demosthenes' private orations was delivered in support of a claim to the exclusive use of a name.⁵ In connexion with confiscations any claim of third persons to some part of the property seized by the State was similarly settled as between the aggrieved party and the State.⁶ In the speech against Zenothemis the dispute between the two merchants Protos and Zenothemis, each of whom claimed a hypothecary mortgage in regard to the corn freight on Hegestratos' ship, must have been engaged by way of a *diadikasia*, and each of them could make out a *prima facie* case.⁷ Perhaps if a number of speeches of Lysias, Isaios, Hypereides, Deinarchos, mentioned by the lexicographers, had survived, we might be able to add other important classes of trials conducted by *diadikasia*, but in the absence of this evidence we can only endorse the supposition⁸ that the *diadikasia* may have served to settle controversies as to the right of property not derived directly from succession or testament, but based on other varieties of title, for example on registration, on donation, on uncontested possession for a long time, etc.⁹

¹ BEAUCHET, pp. 377 f.

² DEM. XXIV, § 13.

³ ANDOKIDES, I, §§ 27, 28.

⁴ The subject was treated in orations which have not come down to us. BEAUCHET, III, p. 380.

⁵ DEM. XXXIX.

⁶ LYSIAS, XVII.

⁷ VINOGRADOFF, "On the legal background in Demosthenes' speech in *Zenothemis v. Demon*." *International Review of Legal History*, 1922, pp. 202 ff.

⁸ BEAUCHET, III, p. 381.

⁹ On the subject of the *diadikasia* our principal authority is G. A. LEIST, *Der attische Eigentumsstreit im System der Diadikasiaen*.

But such suppositions cannot form part of any systematic teaching on the subject.

What is more, there is some evidence of an entirely different course of action open to those who wanted to assert rights as to property. I mean the curious, though controversial, passages bearing on the *δίκη οὐσίας*. We have, to begin with, the following statement in Harpokration's Glossary, which has to be given in full, as there is a considerable difference of opinion among leading scholars as regards its translation and interpretation.¹ It may be rendered in the following way: "Claimants who go to law against those in possession of estates or houses bring the action *οὐσίας* in the second instance, while in the first instance they have recourse to an action *ἐνοικίου* in the case of houses and *καρποῦ* in the case of estates. In the third instance there is the action *ἐξούλης*. It was possible for the holders (the defendants)² to retain possession of the property if they were defeated in actions *καρποῦ* and *ἐνοικίου* or in the second stage as to *οὐσία*,³ while, if they lost in the trial *ἐξούλης* it was impossible for them to hold on any longer to possession, but they had to evacuate the property adjudicated to their opponents." And the lexicographer refers in support of this summary to speeches of various orators, especially of Isaios, and to the eighteen books of Theophrastos' treatise on the laws; unfortunately none of these references can be verified from the texts which have come down to us.

The meaning of the terms designating the four actions is not difficult to make out; the passage deals with actions for the recovery of rents (*καρποῦ*, *ἐνοικίου*), for the recovery of property (*οὐσίας* = *κτημάτων*), and for the recovery of possession (*ἐξούλης*). Nor is the sequence in which the three stages are enumerated an unnatural one, although it does not present the same order as the one usually followed in Roman and in mediaeval procedure, in which litigants tried conclusions as to possession before coming to grips on

¹ For the Greek text see Appendix to this chapter, p. 228.

² The MSS. have *ἐλοῦσι*, which editors alter into *ἐχουσι*.

³ TH. REINACH, in DAR. et S., s.v. *enoikiou dike*, explains *οὐσίας* as *l'action en revendication proprement dite*.

the question of title. In Greece evidently the first step of a claimant asserting his rights as owner of a plot of land or of a house was to demand from the occupier the payment of a rent; the evidence might be easy to obtain by producing testimony as to customary or habitual payments in former years. In a second stage the trial turned to a dispute about the title to the property in question, and this could be termed appropriately a *δίκη ούσίας*, as it concerned the attribution of certain *κτήματα* and not a claim as to rent or proceeds. A third eventuality arose when a person who had been shown to hold as a lessee or whose title had been proved to be inferior continued nevertheless to hold on to the house or to the plot. This was a case of trespass and dispossession, and the remedy open to the plaintiff was a *δίκη ἐξούλης* with its increased fines.

So far the passage does not present any particular difficulty, and we are able to quote in corroboration of it extant references in certain speeches still accessible to modern students. In a fragment of a speech of Lysias preserved by Harpokration the orator asks his adversary why he does not bring an action for recovery of rent (*ἐνοικίου*) in respect of a house which, he asserts, belongs to him.¹ In Demosthenes' speech against Olympiodoros a similar argument is used.²

The only difficulty for the understanding of the passage of Harpokration about *ούσίας δίκη* arises out of the regular progress from the first instance to the second, and from the second to the third. What is the reason of this obligatory ascent from actions as to rent to actions as to property and ultimately as to possession? It seems to me that too much has been made of the systematic statement of Harpokration as to stages of procedure. There is no reason to consider these transitions as obligatory, and we can well imagine that some claimants may have started right away by contesting the title to *κτήματα* (*ούσία*), while others may have brought the action of disseisin (*ἐξούλης*) without going through the two previous stages. We are dealing, after

¹ HARPOKRATION, s. v. καρπού δίκη. See Appendix, p. 228.

² [DEM.] XLVIII, § 45 διὰ τί σὺ . . . οὐδεπώποτε μοι ἔλαχες ἐνοικίου δίκην τῆς οἰκίας, ἧς ἔφασκες μισθῶσαι μοι ὡς σταντοῦ οὖσαν;

all, with a statement by a late lexicographer, who, of course, had the inestimable privilege of being able to refer to a number of speeches and treatises lost to us, but who cannot be relied upon as regards his deductions concerning the connexion to be established between various juridical rules. Even if it were established that there were practical advantages in starting litigation from the point of view of an owner claiming rent, this would not prove that such a preliminary contest was obligatory in all cases of vindication of property in land.¹

The *δίκη ἐξούλης*—the action of disseisin, if we may use such a term derived from the well-known action of Mediaeval common law—took in any case a most important place in Greek procedure, and the best means of judging of its application is offered again by a statement of Harpokration.² Under *ἐξούλης δίκη* he tells us that “it is the name of an action brought by persons who assert that they are being kept out of their own property against those who are keeping them out. The term is said to come from the verb *ἐξίλλειν*, which means to push or thrust out. The action is used also in the case of damages by those who do not get them within the proper time-limit, when the persons convicted become defaulters. Those who succumbed in a *δίκη ἐξούλης* gave up to the successful litigant what they had taken from him, and paid the required penalty to the State. The action was used also by a creditor who tried to obtain possession of some property of his debtor, and who was prevented by some one. Also if a person is deprived of the products of his labour in cultivating land, the law gives an action *ἐξούλης* against the depriving party. So, too, in the case of a slave and of everything in which a person claims rights. This is shown clearly by Isaios and by Lysias in his speech against Stratokles in a trial *ἐξούλης*. Deinarchos, however, in the *diadikasia* of the Krokonidae employs the term in a special sense, applying

The
action of
disseisin.

¹ BEAUCHET's interpretation (III, pp. 368 ff.) tends to turn the *οὐσίας δίκη* into an action for the execution of a decision. Against this see LIPSIUS, p. 680.

² HARPOKR. s. v. *ἐξούλης δίκη*. Cf. above, chap. III, p. 60. See appendix to this chapter, p. 229.

it to the priestess who refused to perform sacrifices. That the action is applicable in every case of ejectment from private property, and not only, as Caecilius thinks, in the case of losers in a trial who owe a fine, is made clear by Phrynichos in his *Proastriæ* (as well as by other evidence)."

The statement is somewhat obscured by the intermixture of general propositions and of references to special cases. This may be the result of the fact that the lexicographer used heterogeneous materials without much skill in sorting them. But apart from this juxtaposition of general rules and particular applications there is nothing contradictory or unreasonable in Harpokration's enumeration. He lays down repeatedly and emphatically that the action *ἐξούλης* was used as a remedy against all kinds of disseisin or eviction, and states specifically that the opinion of Caecilius, who confined the range of the action to the enforcement of rights recognized by judicial decision, but nevertheless withheld by the defendants, is wrong. Two of the special cases in which the action was used—the recovery of slaves and the recovery of products of one's labour—are covered distinctly by the general principle of the security of possession. In two other cases the possession of things withheld is guaranteed by judicial sentences—these are the cases of unpaid fines and unpaid debts. Lastly, there is the reference to the refusal of a priestess to perform certain duties connected with her office. We do not know the circumstances of this last case, but it seems probable that the action was brought by persons or by a corporation interested in the regular performance of certain religious rites and damaged by their interruption; perhaps the priestess had refused to pay a fine inflicted by a judgement.

Even if there were nothing else in the way of material, we should be justified in rejecting Beauchet's contention¹ that the *δίκη ἐξούλης* was restricted to cases when a judicial sentence had been passed, and presented therefore an exact parallel to the Roman *actio judicati*. But there is additional evidence to show that the action in question had a much wider range. There is, for instance, the appli-

¹ BEAUCHET, III, 395.

cation of an action which could hardly be anything else but a *δίκη ἐξούλης* in connexion with the ejection of a man in possession of a bath-house.¹ In this instance the *δίκη ἐξούλης* appears as the counterpart of an *ἐξαγωγή*—an eviction or ejection—and it is probable that a contest following on an ejection led normally to an action of *ἐξούλης* on the part of the disseised. In Demosthenes' speech against Zenothemis,² the *ἐξαγωγή* is spoken of as a form of simulated self-help which could have been converted easily into actual violence, and called for a reaction by *δίκη ἐξούλης*. Altogether the action in question appears to be closely connected with the maintenance of possessory rights against infringement by lawless self-help. In this sense it is a necessary step in the substitution of orderly methods for private self-defence and for execution by private force. No distinction is made between possessory and petitory remedies—both sides are equally covered by the proceedings against illegal intrusion and illegal obstruction of rightful claims.³ At the same time it must be said that although the action resembles the Roman procedure by interdicts, it is entirely devoid of the preliminary character imparted to the latter by the Romans and imitated by Norman lawyers. There is no cogent reason why possession should be regarded as a kind of outwork to property and strictly distinguished in procedure from trials of right and title. As in the cases of the German *Gewere*, procedural methods admitted of a good deal of intermixture between claims based on possession and claims based on title, because title itself was treated not as an absolute, but as a relative qualification.

When all this has been said, it is hardly necessary to point expressly to the fact that the Greeks were not indifferent to the juridical value of possession. Inasmuch as all orderly trials require a proper start from some determined situation of the parties, Greek law prohibited arbitrary seizure of subjects of litigation—chattels as well as plots of land. The law of Gortyn lays down definite rules

¹ ISAIOS, V, 22.

² DEM. XXXII. Philippi was the first to recognize the fact. See article by VINOGRADOFF as above, p. 222, n. 7.

³ Cf. LIPSIUS, p. 667.

about the party who should hold in his possession a slave as to whose ownership there was trial between two claimants.¹ A law of Zaleukos is reported to have settled the matter definitely among the Epizephyrian Lokrians, and Polybios has inserted in his history an account of a complicated case in which one of the claimants had tried to secure for himself the benefit of actual possession by seizing the subject of litigation a short time before the trial.² These instances show conclusively that a kind of *uti possidetis* rule was recognized by Greek jurisprudence. But it remains characteristic of the Greeks that the contrast between possession and ownership was not developed into anything like the elaborate doctrine which obtained in Roman law. Their treatment of the problems connected with individual appropriation may be characterized as fluid and dependent on varying circumstances. Their doctrine of property was indeed governed by the idea of providing safeguards for possessions guaranteed by the city, but it was liable at any moment to be curtailed for the sake of public safety or public service.

APPENDIX TO CHAPTER X

HARPOKRATION, *Lexicon* (ed. Dindorf, 1853), p. 229.

οὐσίας δίκη.

Οἱ δικάζόμενοι περὶ χωρίων ἢ οἰκιῶν πρὸς τοὺς ἔχοντας οὐσίας ἐδικάζοντο τὴν δευτέραν δίκην. ἢ δὲ προτέρα ἦν τῶν μὲν οἰκιῶν ἐνοικίου, τῶν δὲ χωρίων καρποῦ, τρίτη δὲ ἐπὶ τούτοις ἐξούλης. καὶ ἐξῆν τοῖς ἐλοῦσι κρατεῖν τῶν κτημάτων καὶ εἰ τὴν δίκην τὴν τοῦ καρποῦ ἢ τοῦ ἐνοικίου καὶ εἰ τὴν δευτέραν ἠπτηθεῖεν τὴν τῆς οὐσίας· εἰ δὲ καὶ ἐξούλης ἀλοίεν, οὐκέτι ἐξῆν ἐπικρατεῖν, ἀλλ' ἐξίστασθαι ἐδει ἥδη τῶν κτημάτων τοῖς καταδικασαμένοις.

Ibid., p. 169.

καρποῦ δίκη.

Δυσίας ἐν τῷ κατὰ Δημοσθένους ἐπιτροπῆς “εἰ γάρ τι ἔγκαλεις τῷδε τῷ μερακίῳ καὶ τῶν σῶν τι ἔχει, δικάσαι

¹ *I. J. G. I.*, xvii, §§ 1 ff., pp. 354 ff.

² *POLYBIOS*, XII, 16. Cf. *LIPSIUS*, p. 170, n. 120.

αὐτῶ κατὰ τοὺς νόμους, εἰ μὲν χωρίου ἀμφισβητεῖς, καρποῦ, εἰ δὲ οἰκίας, ἐνοικίου, ὥσπερ οὗτος σοὶ νῦν ἐπιτροπῆς δικάζεται.”

Ibid., p. 117.

ἐξούλης δίκη.

“Ονομα δίκης ἦν ἐπάγουσιν οἱ φάσκοντες ἐξείργεσθαι τῶν ἰδίων κατὰ τῶν ἐξειργόντων. εἴρηται μὲν οὖν τοῦνομα ἀπὸ τοῦ ἐξίλλειν, ὃ ἐστὶν ἐξωθεῖν καὶ ἐκβάλλειν. δικάζονται δὲ ἐξούλης, καπὶ τοῖς ἐπιτιμίοις οἱ μὴ ἀπολαμβάνοντες ἐν τῇ προσηκούσῃ προθεσμίᾳ, ὑπερημέρων γενομένων τῶν καταδικασθέντων. οἱ δὲ ἀλόντες ἐξούλης καὶ τῶ ἐλόντι ἐδίδουσαν ἂ ἀφηροῦντο αὐτόν, καὶ τῶ δημοσίῳ κατετίθεσαν τὰ τιμηθέντα. ἐδικάζετο δὲ ἐξούλης καὶ ὁ χρήστης κατέχειν ἐπιχειρῶν χρῆμα τοῦ χρεωστοῦντος καὶ κωλυόμενος ὑπὸ τινος. καὶ ἐπεργασίας δέ τις εἰ εἴργοιτο, δίδωσιν ὁ νόμος δικάζεσθαι πρὸς τὸν εἴργοντα ἐξούλης. καὶ περὶ ἀνδραπόδου δὲ καὶ παντὸς οὗ φησι τίς αὐτῶ μετεῖναι. ταῦτα δὲ σαφῶς Ἰσαῖος διδάσκει καὶ Λυσίας ἐν τῶ κατὰ Στρατοκλέους ἐξούλης. Δείναρχος μέντοι ἐν τῇ Κροκωνιδῶν διαδικασία ἰδίως κέχρηται τῶ τῆς ἐξούλης ὀνόματι ἐπὶ τῆς μὴ βουλομένης τὰ ἴδια δρᾶν. ὅτι δὲ ἐπὶ παντὸς τοῦ ἐκ τῶν ἰδίων ἐκβαλλομένου τάττεται τοῦνομα καὶ οὐχ ὡς οἶεται Καικίλιος μόνων τῶν ἐκ καταδίκης ὀφειλόντων καὶ Φρύνιχος ἐν Προαστρίαις δηλὸν ποιεῖ.

POLLUX, VIII. 59.

Ἡ δὲ τῆς ἐξούλης δίκη γίνεται, ὅταν τις τὸν ἐκ δημοσίου πριάμενον μὴ ἔᾶ καρποῦσθαι ἂ ἐπρίατο, ἢ τὸν νικήσαντα ἂ ἐνίκησεν, ἀλλ' ἢ ἔχοντα ἐκβάλλῃ ἢ σχεῖν κωλύσῃ, ἢ αὐτὸς ὁ ὀφλῶν ἢ ἄλλος ὑπὲρ αὐτοῦ. καὶ μὴν καὶ εἰ ὁ μὲν ὡς ἐωνημένος ἀμφισβητεῖ κτήματος, ὁ δὲ ὡς ὑποθήκην ἔχων ἐξούλης ἢ δίκη.

CHAPTER XI

CONVENTIONS AND TRANSACTIONS

1. *Form and Substance in Conventions.*

Philosophic
view of
conventions.

ARISTOTLE treats in several places of the conventions entered into by individuals and juridical persons. We have already had occasion to speak of his statement in the *Ethics* about voluntarily and involuntarily imposed obligations (*συναλλάγματα ἐκούσια καὶ ἀκούσια*) which correspond to the obligations *ex contractu* and *ex delicto* of Roman and of modern law. In the *Rhetoric*¹ he explains the great importance of conventions for social intercourse and describes them as a kind of law established by private agreement. At the same time he lays stress on the fact that their validity and practical application depend ultimately on the general legal order adopted by the Commonwealth. This close connexion between private agreements and public rules reminds us of the saying of Demosthenes previously quoted,² according to which law (*νόμος*) may be defined as universal convention (*συνθήκη κοινή*). Two important consequences may be deduced from this view of the matter. To begin with, private conventions can only be recognized and enforced if they do not contravene the laws of the city. This should be self-evident, and yet the point must be insisted upon, because there are one or two passages which seem to be in contradiction to it. In Demosthenes' speech against Lakritos³ a convention is mentioned as

¹ *Rhet.* I, 15, § 21 ἡ γὰρ συνθήκη νόμος ἐστὶν ἴδιος καὶ κατὰ μέρος, καὶ αἱ μὲν συνθήκαι οὐ ποιοῦσι τὸν νόμον κύριον, οἱ δὲ νόμοι τὰς κατὰ τὸν νόμον συνθήκας, καὶ ὅλως αὐτὸς ὁ νόμος συνθήκη τις ἐστίν, ὥστε ὅς τις ἀπιστεῖ ἢ ἀναιρεῖ συνθήκην, τοὺς νόμους ἀναιρεῖ. ἔτι δὲ πράττεται τὰ πολλὰ τῶν συναλλαγμάτων καὶ τὰ ἐκούσια κατὰ συνθήκας, ὥστε ἀκύρων γιγνομένων ἀφαιρεῖται ἢ πρὸς ἀλλήλους χρεῖα τῶν ἀνθρώπων.

² Cf. above, p. 18.

³ [DEM.] XXXV, § 13 συγγραφῆ· . . . κυριώτερον δὲ περὶ τούτων ἄλλο μηδὲν εἶναι τῆς συγγραφῆς.

expressly free from objection on the ground of any existing law. It is not admissible, however, that an infringement of any specific command or prohibition was meant. The contracting party signified by this clause that he would not avail himself against the other side of legal rules which might otherwise have been appealed to in favour of the promisor. We frequently find instances of such "renunciations" in mediaeval legal practice.¹ Again in the Arkesine contracts preserved in certain inscriptions found in the island of Amorgos² there is an emphatic declaration that no law or decree shall be deemed stronger (*κυριώτερα*) than the agreement in question. Here again the literal sense of the words cannot obscure their intended meaning. The contract was made on behalf of a sovereign city, and the declaration referred to amounts to a promise that no legislative or administrative measures will ever be taken that might invalidate or curtail the contractual obligations specified.

A second inference to be drawn from the close connexion recognized between the social contract constituting the Commonwealth and private agreements may be expressed in the words that all transactions are recognized as conventions which are enforceable at law. This principle is not devoid of technical meaning and specific application. So-called *natural* obligations are not considered as a separate class, or rather, we should say, Greek law gives an equal force to all varieties of convention established by mutual consent, so-called "nude pacts" being also included. There is, however, an exception which strengthens the rule by its explicit opposition. We are told³ that Charondas declared that in the case of sale the money had to be paid on the delivery of the goods, so that credit agreements were not actionable. Plato develops a similar rule in the *Laws*, and justifies it by the consideration that those who have consented to forgo the receipt of the price for a certain time have implicitly admitted that they are willing to

¹ Cf. MEYNIAL, *Les Renonciations*, in *Nouvelle Revue de droit français et étranger* (1900-1902).

² *I. J. G.* I, xv a, 11, 43 ff., p. 316.

³ THEOPHRASTOS, *ap. STOB. Florileg.* XLIV, 22.

abide by the decision of the other parties to the agreement. These remarks may seem to suggest that friendly arrangements in the nature of non-actionable transactions were not unusual in the Greek world, and it may have occurred sometimes that a so-called *ἔρανος* loan assumed the form of a gift¹; but we find in that very case of *ἔρανοι* that they gave occasion to frequent litigation and were treated in accordance with special methods of procedure, so that the immunity from action cannot have had a lasting effect on the law of the subject. The existence of certain unprotected transactions can be dismissed therefore as a peculiarity of local custom and the product of certain special doctrines.

Early traces of formalism.

Students of ancient law are accustomed to regard the early history of legal transactions as dominated by more or less rigid formalism. It is not only the well-known features of the *jus Quiritium*—the *mancipatio*, the *nexum*, the *manus injectio*, the *sponsio*, the *stipulatio*—that are characterized by ceremonial acts and solemn words without which the transaction remains imperfect and void.² The same recourse to sacramental acts and words is to be observed in Germanic, Celtic, and Slavonic custom. I will cite as an example the dramatic procedure of *affatomia*³ in Salic law—the ceremony of throwing a stick as a symbol of possession into the lap of a middleman, who had to pass the ownership of a house to an intended donee after having performed certain acts of hospitality as master of the house. Everywhere we come across certain forms prescribed by traditional custom in the case of binding acts in law. Quite apart from any particular tendency of the Roman mind to clothe transactions in certain set forms of act and word, there was evidently a cogent reason that induced these various peoples to work out juridical forms and to hold on

¹ [DEM.] LIII, 8 f. ἀπεκρινάμην ὅτι . . . τὰς τε τριακοσίας, ἃς τῷ ἀδελφῷ ἔδωκα ἐφόδιον ὅτε ἐπορεύετο ἐπὶ τοῦτον, ἀφείην αὐτῷ, χιλίας τε δραχμὰς ἔρανον αὐτῷ εἰς τὰ λύτρα εἰσοίσοιμι. . . ἐπειδὴ οὐκ ἠπόρουσαν ἀργυρίου, . . . κομίσας ὡς Θεοκλέα τὸν τότε τραπεζιτεύοντα ἐκπώματα καὶ στέφανον χρυσοῦν . . . ἐκέλευσα δοῦναι τούτῳ χιλίας δραχμὰς, καὶ τοῦτο ἔδωκα δωρεῖαν αὐτῷ τὸ ἀργύριον.

² GIRARD, *Manuel*, pp. 284 ff.

³ GRIMM, *Deutsche Rechtsalterthümer*, I⁴, 662.

tenaciously to them even in epochs of more advanced intercourse. Nor is it impossible to unravel the reason of such formalistic treatment. It may be explained to some extent by the wish to ensure the observation of the agreement by a quasi-religious sanction, and to give a sharp and marked manifestation to certain important acts of the parties concerned, and of impressing them on the surrounding public. One might go further and interpret the curious combinations of formal acts and solemn words—like the joining of hands (*destrarum prehensio*, *paumée*, handfasting, ἐγγύη, related to γυία),¹ the solemn declaration in set formulas, the swearing of oaths, and the ceremonial steps (the *heptopada* of the Brahmanic marriage) as traditional remnants of religious rituals of alliance or pacification.² In any case it is evident that archaic formalism goes back to much deeper roots than mere superstition or magic practices suggested by individual devices. The reasonable explanation for these universally recurring usages has to be sought in tribal custom and relations between kindreds which necessarily assumed the character of international treaties,³ although it would be hazardous to try to account for every detail by reference to a system of religious law. Let us see whether definite traces of this archaic formalism may not be discovered in Greek tradition. At first sight it seems that nothing similar to the elaborate rules of Roman or Germanic custom obtained in Greece. There is nothing so picturesque and concrete in the legal custom of the Greeks in spite of their well-known sensitiveness to outside impressions. All the authorities agree that the binding force of Greek contracts did not depend on the strict adherence to any particular form. All that we know about them suggests again and again that the obligation in voluntary agreements depended on consent, on the mutual concurrence of wills. There was, however, in reality no irreconcilable contrast between the development of Greek law and that of other national systems in this respect. There are some traces of

¹ Prof. J. A. Smith suggests that the term may be interpreted as ἐγγύη, *emancipatio*.

² L. GERNET, in *Revue des études grecques*, see below, p. 235 note.

³ Cf. *Outlines of Hist. Jur.* I, 364 ff.

formalism in ancient Greek custom, while, on the other hand, Roman law in the course of its evolution arrived eventually at the recognition of intention and consent as the constitutive factors in contract; this result was achieved at a late stage by means of the *jus honorarium* and the *jus gentium*. The archaic methods of the *jus civile* stood out in consequence in sharper outlines. What we are concerned with now, however, is to show that in spite of the early prevalence of the consensual contract conditioned by the lively commercial intercourse of the Greek cities and the sensitiveness of the nation as regards psychological aspects of jurisprudence, there are distinct traces of archaic formalism in the treatment of transactions at an early stage of Greek civilization.

A starting-point is afforded by the Homeric tale of the capture of Ares and Aphrodite by the jealous Hephaistos.¹ The culprits are entangled in the net cunningly laid for them by the lame husband. The assembled gods enjoy the sight and laugh at the comical situation. Poseidon, however, takes the part of Ares and entreats Hephaistos to free Ares from the bonds, assuring him that the ransom required by the offended husband would be paid by the adulterer. Hephaistos refuses on the ground that if Ares takes to flight instead of paying, he will not be able to exact anything from Poseidon: *δειλαί τοι δειλῶν γε καὶ ἐγγύαι ἐγγυάσθαι*. Thereupon Poseidon pledges himself to pay the fine himself if Ares escapes without paying it, and Hephaistos agrees to accept that second promise. There has been a good deal of controversy in connexion with this passage. Partsch² has explained it as an assumption of liability on the part of Poseidon, who acts as an *ἐγγύης*, that is, a surety for Ares, and offers himself as a hostage to Hephaistos in the place of the culprit. Esmein and Glotz have translated *ἐγγύαι* as promises, and have explained the whole transaction as the substitution of a convention with Poseidon for the convention with Ares, as originally proposed by Poseidon.³ M. L. Gernet has

¹ *Odyssey*, VIII. 305 ff.

² *Griechisches Bürgerrechtsrecht*, I, 11 ff.

³ ESMEIN, *Mélanges de Rome*, VIII, 436. GLOTZ, *Solidarité*, p. 132.

recently developed their thesis further in a very subtle and interesting disquisition,¹ assuming that Poseidon's action in the matter was a manifestation of solidarity between kinsmen. The enigmatic verse 351 quoted above in Greek is translated from this point of view as follows: "the promises of the weak (*impuissants*) are weak promises." A decisive turn is supposed to have been given to events by this reply of Hephaistos: he refused to enter into a convention with the powerless Ares, and in consequence Poseidon pledged himself to pay the fine himself.

I may say that the interpretation defended by the French scholars seems convincing in a general way. Partsch's theory, built up on the analogy with the German submission of hostages as sureties (*zur Hand gehen*), leaves unexplained the curious subdivision of the narrative into two distinct parts—the first dealing with a promise by Poseidon on behalf of a third person, which Hephaistos does not accept; the second indicating that Poseidon steps in himself as a party to a convention, which Hephaistos does accept. What is more, a translation which refers the *δειλία* to Hephaistos, and renders *ἐγγύαι* by *sureties* and *ἐγγυάσθαι* by *accepting sureties* seems misleading, because there is no likelihood that the speaker would disparage himself, while in reference to Ares the expression *δειλῶν* would apply naturally, as he was bound and therefore would have acted under duress. Besides, Partsch's interpretation makes it impossible to connect the two accepted meanings of *ἐγγυᾶν*—*to stand as surety* and *to give in marriage*—by any reasonable transitional link similar to the Latin triad—*sponsor, sponsio, sponsalia*.

We shall have occasion to come back to the question of sureties. What we are concerned with now is the fact that the passage in question treats of two kinds of conventions practised in ancient Greek law, and calls them *ἐγγύαι*. Now this leads directly to the consideration of the Greek betrothal as a contract originating in the tribal stage of Greek civilization, but enduring with characteristic modifications in the classical period of the city. The Greek

¹ L. GERNET, *Revue des études grecques*, XXX (1917), pp. 254 ff.

ἐγγύη appears as a characteristic formal contract like the Old English wedding and the Scandinavian *máldagi*.¹ The requirement of a formal betrothal stated in an old law quoted by Demosthenes laid stress on the performance of rites established by law. In order to breed legitimate children a man has to marry a wife in accordance with legal custom (ἐπὶ δικαίους). By a piece of luck even the formulae employed in the Greek wedding have been preserved for us by Herodotos in the story of Megakles' marriage with Agariste.² Kleisthenes, the father of the bride, pronounces the sacramental formula of betrothal—ἐγγυῶ παῖδα τὴν ἐμὴν Ἀγαρίστην, νόμοισι τοῖσι Ἀθηναίων—and the bridegroom confirms the contract by his acceptance, φαμένου δὲ ἐγγυᾶσθαι Μεγακλέος, ἐκεκύρωτο ὁ γάμος Κλεισθένει. There can be no doubt that the juridical basis of marriage was provided in ancient law by a formal contract of betrothal (*verbis*) concluded between the father or curator (κύριος) of the bride, on behalf of her family or kindred, and the bridegroom, behind whom stood his family or kindred, as we may infer from the analogy of the wedding.³ Even at a later epoch the ἐγγύησις ἐπὶ δικαίους remained the legal foundation of legitimate descent and consequently of legitimate marriage. The institution was materially modified by later practice, and the consummation of marriage came to be recognized as a second element in the formation of the contract.⁴ We are, however, not concerned at present with these later developments, but with the evidence afforded by ancient custom as to the verbal formalism of an important contract in early Greek law.

Coming back to Demodokos' story in the *Odyssey*, let us notice that the term characteristic for the wedding of a betrothed bride was applied by the rhapsode to a convention as to compensation for adultery. If the interpretation accepted by Esmein, Glotz, and Gernet is right, Poseidon suggested first a convention between Ares and

¹ Cf. AMIRA, *Nordgermanisches Obligationenrecht*, II, 282 ff., and *Grundriss des germanischen Rechts*, 181 ff.

² HERODOTOS, VI, 130.

³ *Outlines of Hist. Jurispr.* I, p. 319.

⁴ Demosthenes' mother and sister were ἐγγυηταί, but not married; see his speech against Aphobos A (XXVII). Cf. DEM. XLI.

Hephaistos, and subsequently offered to conclude a convention himself with the aggrieved husband of Aphrodite. No sacramental words were pronounced, and no solemn acts were performed on the occasion, but it has been pointed out with considerable probability¹ that the repeated reference to the presence of the gods, who witness the transaction, lends it validity. Publicity is one of the requirements of a formal convention; the dramatic performance which gives a concrete expression to the concurrence of wills must take place before the public; its proper public is originally the assembly of the people in arms or in its civil capacity. Legal history presents curious examples of the gradual symbolization of this civic public—the substitution of skeleton *comitia* for the real *comitia* in the Roman procedure of adoption and testament-making, the probable substitution of the ten witnesses in the *confarreatio* ceremony. In Greek law the formal requirements of archaic contracts made way for two modern institutions—registration, which was currently employed, for instance, in the matter of constitution of dower, and the calling in of witnesses, which was, however, not required as a necessary element of the convention, though it was considered the best means for proving facts.

Another set of comparisons that is suggested by the study of Greek contracts bears on the question whether certain conventions might be void or voidable on account of a substantial flaw. It need hardly be said that there are no indications of the doctrine of consideration, dear to the hearts of Common lawyers. French lawyers with their staunch adherence to the necessity of an adequate *cause* to justify a convention also look with disappointment on the attitude of Greek courts of the classical period in this respect. There was no definite limit to the capacity of an Athenian to enter into any kind of convention that he desired, provided it was not made in defiance of the laws of the City.² Sometimes agreements were made for immoral purposes, for example, for entering into or continuing

Requirements of substance.

¹ GERNET, *loc. cit.*

² BEAUCHET, *Droit privé*, IV, p. 42.

immoral intercourse, but these were obviously supported rather by bad customs than by judicial authority: at any rate there is no evidence as to actions brought before the courts in connexion with them. On the other hand, Athenian litigants did not scruple to press home agreements intended to achieve some result which could not be described as straightforward or even honest. The dispute between Kallistratos and Olympiodoros presents a case in point. A convention had been made between them for the acquisition of an inheritance that could only be obtained by one of the parties concerned if the claim of the other party was wrong. Nothing prevented Kallistratos from trying to get the agreed advantage from the *suppressio veri* and *suggestio falsi* which had been arranged between the partners.¹ This, however, is rather a reflection on the state of current Greek morality than a characteristic of the legal system.

On the whole, it may be said without fear of contradiction, that conventions in Greece in the classical period were formed by simple consent, *ὅσα τις ἂν ἔκων ἕτερος ἐτέρῳ ὁμολογήσῃ, ταῦτα κύρια εἶναι*.² In keeping with this absence of formal requirements stands the absence of definite terms or rather the occurrence of several terms designating conventions. *Συνθήκη, συνάλλαγμα, ὁμολογία*³ are used more or less indiscriminately. *Συγγραφή* has a somewhat more special connotation because it applies as well as *χειρόγραφον* to written instruments. The writing is not, however, of the essence of the convention in the classical period in the same sense as the *verba* of the *stipulatio* are of the essence of the Roman verbal contract. An important modification of this statement will have to be noticed in course of time. At present we are considering the principles of the classical period, and it is clear that writing was not an obligatory condition for the validity of any kind of convention at that time, although it was commonly used by business-like persons in order to secure

¹ DEM. XLVIII, *passim*. Cf. DARESTE, *Plaidoyers civils de Démophile*, II, p. 2.

² DEM. LVI, § 2; XLVIII, § 54. HYPER. VI, §§ 7, 8.

³ BEAUCHET, *op. cit.*, IV, 15, 53 ff.

convenient proofs of the transaction. In Plato's *Krito* stress is laid on the purely consensual essence of conventions,¹ while in the pseudo-Demosthenic speech against Timotheos² a convention is mentioned which had not been secured either by a written instrument or by witnesses. Yet it is not treated as invalid for that reason, but as incapable of being ascertained in its details. It was therefore possible for an Athenian pleader to build up an argument on circumstantial evidence that made a convention probable, although no instrument or deposition could be produced in Court.³

All this is true, and it would be wrong to judge of Greek contractual law from the point of view of the rigid rubrication of forms and requirements of contract with which we are familiar in Roman and in modern law. The Greeks treated conventions as they treated delictual obligations in the light of utility (τὰ συμφέροντα) and of equity (τὸ ἐπιεικές). The centre of interest lay for them in the intentions of the parties, but this did not exclude the advisability of taking precautions for the proper and effective carrying out of these intentions. Registration, witnesses, and instruments were not strictly obligatory: even in their absence a party to a convention could claim an *equitable remedy*, and was allowed to argue for its recognition, but the usual method of claim was legal, and based on some tangible kind of proof—registration, witness, instrument.⁴

Equity in conventions.

The necessities of business intercourse led gradually to a use of instruments (συγγραφαί) that amounted to the The literal contract.

¹ PLATO, *Krito*, 51 e δὲ δ' ἂν ὑμῶν παραμείνη . . . ἤδη φάμεν τοῦτον ὁμολογηκέαι ἔργω ἡμῖν ἂ ἂν ἡμεῖς κελεύωμεν ποιήσειν ταῦτα, καὶ τὸν μὴ πειθόμενον τριχῆ φάμεν ἀδικεῖν, . . . καὶ ὅτι ὁμολογήσας ἡμῖν πείσεσθαι οὔτε πείθεται οὔτε πείθει ἡμᾶς, εἰ μὴ καλῶς τι ποιούμεν.

² [DEM.] XLIX, § 2 λαβῶν ἀργύριον . . . οὐ μόνον οὐκ ἀπέδωκε χάριν, ἀλλὰ καὶ τὸ δοθὲν ἀποστερεῖ με. καίτοι σφαλέντος μὲν τούτου ἀπώλλυτο . . . τὸ συμβόλαιον· οὔτε γὰρ ἐπ' ἐνεχύρωσιν οὔτε μετὰ μαρτύρων ἔδωκε (ὁ πατήρ).

³ BEAUCHET, IV, 23.

⁴ DEM. XXXIII, § 36 πάντες ἄνθρωποι, ὅταν πρὸς ἀλλήλους ποιῶνται συγγραφάς, τούτου ἕνεκα σημηνάμενοι τίθενται παρ' οἷς ἀν πιστεύσωσιν, ἵν' εἴαν τι ἀντιλέγωσιν, ἢ αὐτοῖς ἐπανελθοῦσιν ἐπὶ τὰ γράμματα, ἐντεύθεν τὸν ἔλεγχον ποιήσασθαι περὶ τοῦ ἀμφισβητουμένου. Cf. BEAUCHET, *op. cit.*, IV, 19 ff.

recognition of a species of formal convention, the contract *litteris*, as conclusive in itself and not merely accessory as a proof of the existence of a consensual agreement. This process appears most distinctly in documents of the Hellenistic and of the Roman epoch, but there can be no doubt that the later evidence only summarizes a development which proceeded from the practice of the classical age. As this subject has been discussed controversially since the publication of a famous monograph by Gneist,¹ it might not be amiss to point to certain determining considerations in the treatment of the question. The problem arises from the fact that a certain kind of Greek contracts, namely the bilateral *συγγραφαί*, are mentioned by Roman writers as constituting an obligation in themselves, apart from and even in contradiction to the actual transactions which underlay them. Two passages are usually quoted in this connexion. Gaius² tells us that foreigners in the provinces—evidently Greeks or Hellenized Orientals—were using instruments of their own (*συγγραφαί*) to conclude obligatory conventions instead of the usual Roman contracts. A scholiast of the fifth century, pseudo-Asconius, has an even more explicit statement on the subject.³ He makes a distinction between *chirographa*, written documents, and *συγγραφαί*, inasmuch as the first merely report what has actually taken place, while in the latter a convention arises even if the statement does not correspond truly with what has happened. In the *syngrapha* sums of money are commonly mentioned which have not been paid or have only been paid in part as the persons concerned expressed their wish at that time. This is in accordance with the customs and rules of the Greeks.

¹ GNEIST, *Die formellen Verträge des neueren römischen Obligationenrechts in Vergleichung mit den Geschichtsformen des griechischen Rechts*.

² GAIUS, III, § 134 *Praeterea litterarum obligatio fieri uidetur chirographis et sygraphis, id est si quis debere se aut datum se scribat; ita scilicet si eo nomine stipulatio non fiat. quod genus obligationis proprium peregrinorum est.*

³ PSEUDO-ASCONIUS in *Verr.* II, 1, 36 *Inter syngraphas et cetera chirographa hoc interest, quod in ceteris tantum quae gesta sunt scribi solent, in sygraphis etiam contra fidem veritatis pactio venit et non numerata quidem pecunia aut non integre numerata pro temporaria voluntate hominum scribi solent more institutoque Graecorum; et ceterae tabulae ab una parte servari solent, syngraphae signatae utriusque manu utrique parti servandae traduntur.*

Besides, other instruments are kept by one of the parties only, while the *συγγραφαί* are executed by both parties, and copies are in the keeping of both.

Gneist does not acknowledge that these references to binding contractual forms of Greek origin testified to the existence of a specific literal contract used in the Eastern provinces of the Empire concurrently with the usual Roman forms. Lately Professor Brandileone has come forward with a renewed defence of Gneist's conclusions, arguing that the Greeks never recognized anything but conventions by consent, and that, in so far as there can be any talk of alteration of the law of contracts in the Imperial period, it amounted to the gradual spread of a modified form of the Roman verbal contract—the *stipulatio*, which was largely adopted by foreigners, especially after the publication of Caracalla's constitution of A. D. 212 by which Roman citizenship was granted to the provincial subjects of the Empire.¹ He contests the value of the passages of Gaius and pseudo-Asconius for the solution of the problem. Gaius is supposed to be stating certain reflections on Greek practices from the point of view of the Roman classification, while the evidence of the scholiast is brushed aside as a confused statement of a late writer, incapable of grasping nice distinctions or of giving an exact account of them. As far as Brandileone allows he finds it a positive significance to this notice in the reference to a "temporary" intention of the parties which does not modify the fundamental grounds of contracts concluded either *re* or *verbis*. Such special pleading can hardly remove the impression conveyed by Gaius and the scholiast that a species of literal contract had found a home in the Eastern provinces, and had struck firm roots there in spite of the extensive diffusion of Roman citizenship and Roman rules in the beginning of the third century B.C.

The epoch-making investigations of Mitteis bearing on the vitality of Hellenistic vulgar law in the East have led to a revision of Gneist's doctrine. In a chapter of his

The doctrine of Mitteis.

¹ BRANDILEONE, *Sulla supposita obligatio litterarum nell' antico diritto greco*. Bologna. 1920.

Reichsrecht und Volksrecht Mitteis called attention not only to the weighty import of the passages just quoted, but to the rich harvest of contractual instruments in the inscriptions of Greece and Asia Minor, as well as in the papyri of Egypt.¹ He saw in them examples of a mode of concluding conventions that had taken shape in the East, under the influence of the common use of writing, for the sake of securing adequate proof of agreements of all kinds. Gradually the literal form of the contract had hardened, as it were, and had become a constitutive factor of the agreement. In consequence various obligations were apt to assume the outward form of a contract (*συγγραφή*) of debt, and to obtain execution on the strength of formal though fictitious instruments independently of the actual transactions which had taken place under their cover. Mitteis pointed to a signal instance in the inscription reciting the dealings of the woman banker, Nikarete of Thespieae, with the city of Orchomenos in Boiotia.² She had lent money to the city on several occasions, but the city was unable to pay on the expiration of the term. A respite was granted in the guise of a fictitious loan to the three polemarchs, the treasurer, and ten persons selected by Nikarete from among the citizens, with powers for the creditor to proceed to execution against these persons, and with the proviso that the new *συγγραφή* could be made payable to bearer. When the time came for the substitutes to make the agreed payment, it was delayed again for a short time and a convention (*ὁμολογία*) was made with the city itself that the sum due should be paid in the course of two months. In this convention the story of the previous transactions was briefly recited as a preamble to the promise of payment. This time the city acquitted its debts, and ordered the various instruments bearing on them to be engraved on a stone slab. It is evident, as Mitteis points out, that the loan contract (*συγγραφή*) concluded with the fourteen select citizens of Orchomenos was a fictitious instrument representing an entirely different transaction

¹ *Reichsrecht*, p. 479 ff.

² *I. J. G.* I, xiv, pp. 276 ff. Cf. pp. 333 ff.

from those which had actually taken place. It asserted "contra fidem veritatis" that 18,833 drachmae had been paid by the lady at Thespieae to the fourteen persons in question, while in reality these 18,833 drachmae represented the sum total of a number of loans made to the city. Thus the formal device of a loan was used to cover a contract of suretyship, and the meaning of the transaction was obviously to make it possible for the creditor to recover his money by execution against representative citizens instead of proceeding to a cumbersome and uncertain execution against the city at large. The practice of directing an execution against private citizens for the satisfaction of a debt incurred by a city was by no means unusual in Greece, and is illustrated on a large scale by contracts as to loans concluded by the city of Arkesine in the island of Amorgos. While insisting on the formal character of the title obtained by the creditor in the *συγγραφή* under discussion, Mitteis did not assert that in all cases when a *συγγραφή* or *cautio* was presented the existence of the writing made it impossible to plead for the nullity of the contract on the ground of fraudulent misrepresentation. The practice of Imperial rescripts mentioned in Justinian's *Codeæ* shows that the Roman authorities did not renounce the right of verifying the good faith of parties to a transaction.¹ But the exercise of such an eminent control does not alter the fact that for ordinary purposes the statement of a duly executed *συγγραφή* was taken as conclusive without reference to the contents of the actual transaction. It is difficult to meet the evidence adduced by Mitteis from the point of view of Gneist's theory. The most recent follower of this theory, Professor Brandileone, is constrained to urge that the Nikarete transactions are based on a real contract in so far as the money had been actually paid by the banker, and that a reference to this *causa* of the obligation is to be found in the last convention (*ὁμολογία*) which preceded the payment of the debt by the city. But this cannot explain away the *συγγραφή* conditioning the original respite and composed in the style of an independent and fictitious loan

¹ *RICCOBONO* in the *Z. SS. Rom. Abth.* XXXV, 214 ff.

to the fourteen Orchomenians. The desperate expedient of treating the two documents as one connected whole, and looking for the material cause of both in the later one of the two, will hardly satisfy unprejudiced readers. One may well ask what *causa* there was in the earlier *συγγραφή* apart from the fiction of a loan received by the fourteen sureties.

To sum up this rather lengthy disquisition: we have to admit, I think, that although Greek law laid chief stress on the concurrence of the wills of parties to a convention, the constant recourse to written instruments for the sake of proof led gradually to the development of literal contracts in which the form of the instrument came to be considered as establishing a contractual obligation, and it was not easy, though not impossible, to rebut the presumption by direct proof of fraudulent misrepresentation. This process had gone so far in the course of the Roman period that the codification of Justinian and the mediaeval gloss derived from it assumed the literal contract to be one of the recognized species of contractual obligation, and the pseudo-Asconius gloss is interesting in so far as it traces that class of conventions definitely to Greek sources. But the notice in Gaius III, 128-34, shows that the instruments of the Greeks were already regarded as specimens of literal obligation in the beginning of the second century. Egyptian papyri and the Orchomenos inscription help to trace the connexion with earlier Greek practice. It is not far from a *συγγραφή* of 230 B. C. to the *συνθήκαι* of which Demosthenes speaks in the speech against Apaturos or Hypereides in the speech against Athenogenes.¹ Even though a wide latitude must be assumed as regards pleadings based on the equity

¹ DEM. XXXIII, § 15 *καὶ συνέθεντο ἐν ταῖς συνθήκαις, εἰ μὲν τρεῖς ὄντες ἰσογνώμονες γενοίμεθα, ταῦτα κύρια εἶναι αὐτοῖς, εἰ δὲ μή, οἷς οἱ δύο γνώσησαν, τοῦτοις ἐπάναγκες εἶναι ἐμμένειν. συνθέμενοι δὲ ταῦτα, ἐγγυητὰς τούτων ἀλλήλοις κατέστησαν.* Cf. § 19.

HYPER. III (V), § 8 *ὡς γὰρ εἰπόντος αὐτοῦ ταῦτα ἐγὼ προσωμολόγησα, εὐθύς ἐκ τῶν γονάτων λαβὼν τῶν αὐτοῦ γραμματείων τὸ ἐγγεγραμμένον ἀνεγίγνωσκεν. ἦσαν δὲ αὐτὰι συνθήκαι πρὸς ἐμέ· ὧν ἐγὼ ἀναγιγνωσκόμενον μὲν ἤκουον, ἔσπευδον μέντοι ἐφ' ὃ ἤκον τοῦτο διοικήσασθαι, καὶ σημαίνεται τὰς συνθήκας εὐθύς ἐν τῇ αὐτῇ οἰκίᾳ ἵνα μηδεὶς τῶν εὐφρονούντων ἀκούσαι τὰ ἐγγεγραμμένα, προσεγγράψας μετ' ἐμοῦ Νίκωνα τὸν Κηφισία.*

of mutual consent, the influence of the prevailing practice as to proof did gradually pave the way for the recognition of the force of properly drawn-up instruments.

2. *The Enforcement of Obligations.*

The most characteristic contract of early law is *debt*, and the means of execution against a party who does not fulfil his obligations are chiefly manifested in the case of non-payment of loans. The simplest way of coercing an insolvent debtor was to seize him personally and to hold him captive so long as the loan had not been repaid. There is plenty of evidence to show that the Roman *nexum* had its parallels in Greek law. In the archaic period it was prevalent everywhere, as we can judge, for example, from the account of the state of Attika before Solon, when the greater part of the population was burdened with debts and many were imprisoned or even sold into slavery over the border. One of the chief measures of Solon's reform put an end to this disastrous condition by prohibiting the seizing of debtors in their persons,¹ and we are told that in this matter the Athenian legislation followed a precedent set by Bokchoris in Egypt²: it was held that although property belonged to private individuals and could therefore by right be attached for their debts, the persons of the debtors belonged to the city, which ought not to lose its subjects on account of their private liabilities. However, even after Solon, personal imprisonment of debtors took place in Athens on some occasions in the case of debtors who could not fulfil their obligations to the State³ and in execution of commercial debts.⁴ The latter case is noteworthy because it must have occurred very often: the remedy was evidently suggested by the necessities of lively commercial intercourse regulated by summary decisions in 'monthly trials' (*ἐμμηνοὶ δίκαι*).

In the rest of Greece the arrest and imprisonment of

¹ PLUTARCH, *Solon*, c. 13. AR. *Ath. Const.* c. 6.

² DIODORUS SICULUS, I, 79, 4; 94, 5.

³ HERMANN-THUMSER, *Griech. Alterth.* I, 568.

⁴ DEM. XXXIII, § 1.

insolvent debtors was universally practised and obviously much favoured by creditors as a likely means of obtaining payment either from the debtor himself or from his relatives and friends. We find it specifically mentioned in Hali-karnassos,¹ in the Orchomenos contracts in regard to sureties,² and in the contracts of Arkesine, as one of the ordinary forms of execution.³

Distress.

By the side of personal arrest corresponding to the *manus injectio* of Roman law stood the seizure of goods belonging to the insolvent debtor or to the party that had broken some convention—for example, had failed to pay rent within an agreed term. The seizure might be only directed towards securing a gage like the *pignoris capio*, or it might be an actual execution (*πρᾶξις*) intended to give satisfaction to the full to the creditor or claimant. Originally it was not possible to draw careful distinctions between these two varieties. Distress took the form of forceful self-help (*συλλᾶν*) and was used in the enforcement of compensation for delicts as well as in the execution of conventions.⁴ It was based on a claim of right, the enforcement of which had to be justified if necessary before the Courts of the city. Distress preceded the judicial trial as a rule, and the proper means of defending oneself against unjust distress was to oppose it by force, always with the proviso of subsequent justification. An illustration of this kind of authorized private action may be found as late as in the Makedonian period (second century) in the documents relating to the establishment of the franchise sacred to Dionysos in Teos.⁵ The Arkadians join in the declarations of immunity from distress of the territory in question and concede the right to the Teians to seize the persons and the goods of any Arkadians who should commit injustice within the precincts of the franchise. The right to oppose unjust incursions takes the shape of a counter-distress as to the

¹ *I. J. G.* I, i, pp. 2 ff.

² *Ibid.*, xiv, pp. 376 ff.

³ *Ibid.*, xv, pp. 313 ff.

⁴ See above, Chaps. VIII and IX.

⁵ MICHEL, 58, p. 68, ll. 31 ff. l. 35 αἱ τινες τῶν ὀρρωμένων Ἀρκάδων ἀδικήσωντί τινα Τηίων ἢ κοινᾶ ἢ ἰδίαι πᾶρ τὸ γραφέν δόγμα περὶ τῆς ἀσυλίας ὑπὸ τῆς πόλιος τῆς Ἀρκάδων, ἐξέστω τῷ παραγενομένῳ Τηίων ἐπιλαβέσθαι καὶ τῶν σωματῶν καὶ χρημάτων, αἱ τίς κα ἀγῆι.

persons and the property of the offenders. It is obvious that the people using such reflected distress did not wait until they had obtained a condemnation, but acted on their private responsibility in the hope of justifying their conduct eventually before a tribunal if it was impugned by any one.

The tendency to avoid judicial trials is manifested in an orderly form in a number of conventions which mention specifically that the non-fulfilment of conditions agreed upon by one party will give the other party the right to proceed to execution without having recourse to the formalities of judicial procedure. A clause in point is quoted by Demosthenes in his speech against Lakritos.¹ It occurs twice in the Arkesine contracts—once in the form of a reference to the treaty between Naxos and Arkesine, and the second time in the shape of an express statement that if the debtors are remiss in paying off the capital, the city and all its inhabitants should be subjected to execution *καθάπερ δίκην ὠφληκῶτων ἐξούλης ἐν τῇ ἐκκλήτῳ καὶ ὄντων ὑπερημέρων ἀζημίῳ ὄντι πάσης ζημίας*.² The reference to the *δίκη ἐξούλης* shows that the creditors had the right to proceed without further delay to execution, but that the judgement which might have been an equivalent to their direct action would have been a judgement in disseisin, implying a penal element. It seems that this highly threatening wording of the contract was intended to emphasize in every way the stringent character of the obligations to which the debtors had to submit. It presents in this regard a marked contrast with the lenient treatment of Orchomenos by Nikarete. But these are distinctions of fact; as for the law it amounted substantially to the right of the creditor to take immediate

¹ [DEM.] XXXV, § 12 εἰ δὲ μὴ ἀποδώσιν ἐν τῷ συγκειμένῳ χρόνῳ, τὰ ὑποκείμενα τοῖς δανείσασιν ἐξέστω ὑποθεῖναι καὶ ἀποδοῦσθαι τῆς ὑπαρχούσης τιμῆς· καὶ εἰάν τι ἐλλείπῃ τοῦ ἀργυρίου, οὐ δεῖ γενέσθαι τοῖς δανείσασιν κατὰ τὴν συγγραφὴν, παρὰ Ἀρτέμωνος καὶ Ἀπολλοδώρου ἔστω ἡ πράξις τοῖς δανείσασιν καὶ ἐκ τῶν τούτων ἀπάντων, καὶ ἐγγείων καὶ ναυτικῶν, πανταχοῦ ὅπου ἂν ᾖσι, καθάπερ δίκην ὠφληκῶτων καὶ ὑπερημέρων ὄντων, καὶ ἐνὶ ἐκατέρῳ τῶν δανεισάντων καὶ ἀμφοτέροις.

² *I. J. G.* I, xv, p. 318, § 6. Cf. the commentary of the editors, pp. 333 ff.

action (ἐμβάτευσις) without attending to any cumbersome technicalities of judicial procedure. The care taken in certain cases to give notice that execution will follow without any reference to the decision of a Court implies that usually the procedure was not so simple and the aggrieved party had to apply for redress to a tribunal. The result would be eventually reached by a roundabout way, but would be the same in substance as one by *πράξις* directed against the property of the defaulter *ex causa judicati*.¹ In general it may be taken for granted that goods were seized or plots of land and houses occupied by the creditors themselves, without intervention of officers of the City,² although by way of exception, magistrates might have to lend their assistance for the execution of the judgement; in Athens the demarchs acted in this capacity.³

Sureties.

Greek law was exceedingly prolific in the matter of securing the fulfilment of obligations by providing guarantees from third persons. Looking back for a moment at Demodokos' story in the *Odyssey*,⁴ let us notice that the intervention of Poseidon has a decisive influence in persuading Hephaistos to conclude a convention as to the payment of the fine (μοιχάγρια) incurred by Ares, and that the convention is concluded directly between the offended party and the intervener, while not a word is pronounced by the culprit. This is characteristic of the attitude of a surety in ancient law. Poseidon's obligation is not an accessory to that of a principal, but a substitute for the latter. Although there is nothing to indicate that Poseidon assumes the part of a hostage,⁵ his responsibility in regard to the payment of the fine is placed in the foreground, a *vinculum* binds him to Hephaistos, while it remains for him to seek satisfaction from Ares, whose release he has procured. This tallies well with the position of a chieftain or an influential relative of the offender. In later law, we

¹ BEAUCHET, IV, 446 f.

² DEM. XLVII, 35.

³ HAUSSOULLIER, *La vie municipale à Athènes*, pp. 104 ff.

⁴ Above, p. 234.

⁵ This is the view held by Partsch, *op. cit.*, pp. 23 f.

come across a conception of suretyship derived from these archaic antecedents. Sureties appear in all kinds of conventions—as to voluntary agreements as well as in delictual obligations. In the speech of Demosthenes against Pantainetos,¹ for instance, an arrangement to abide by the deposition of a slave is guaranteed by sureties on both sides. In the speech against Apaturios a similar convention is made between two adversaries to abide by the decision of a board of arbitration. Every lease, every loan, is corroborated by sureties. In the case of criminal responsibility, sureties were personally liable for the appearance of the accused and for the fulfilment of the sentence, so that in case of his absconding they might be subjected to the punishment incurred by him. When Agoratos took to flight his sureties also escaped,² and Andokides even talks of unfortunate men put to death in the course of the Hermakopidae affair, because the persons for whom they had stood surety had fled.³ This extreme instance may, however, be explained by the state of panic which prevailed in Athens at that time. In any case the fact that sureties were made liable to the full extent of the principal obligation and were proceeded against without delay or excuse is characteristic of the social tendency of the institution—the lack of confidence in the credit and good faith of single individuals and the spreading of the circle of responsibilities to the friends or relatives of the principals.

A curious modification arose when a convention was made secure by the setting aside of a certain sum in the keeping of a reliable third person in order that it should be paid to

¹ DEM. XXXVII, § 40 ἀναγιγνώσκει μοι πρόκλησιν μακράν, ἀξίων ὄν φησιν οἰκίτην ταῦτα συνειδέναι, βασανίζεσθαι, κὰν μὲν ἢ ταῦτ' ἀληθῆ, τὴν δίκην ἀτίμητον ὀφλεῖν αὐτῷ, εἰάν δὲ ψευδῆ, τὸν βασανιστὴν Μνησικλέα ἐπιγνώμων' εἶνα τῆς τιμῆς τοῦ παιδός. λαβὼν δ' ἐγγυητὰς τούτων παρ' ἐμοῦ κτλ.

² LYSIAS, XIII, §§ 24 ff. ὁ δὲ Ἀγόρατος καὶ οἱ ἐγγυηταὶ καθίζουσι ἐπὶ τὸν βωμὸν Μουμχίαςιν' ἐπειδὴ δὲ ἐκάθισαν, ἐβουλεύοντο τί χρῆ ποιεῖν' ἐδόκει οὖν τοῖς ἐγγυηταῖς καὶ τοῖς ἄλλοις ἅπασιν ἐκποδῶν ποιήσασθαι τὸν Ἀγόρατον ὡς τάχιστα, . . . καὶ αὐτοὶ ἔφασαν συνεκπλευσεῖσθαι.

³ ANDOK. I, § 44 ἀκούσαντες δὲ ταῦτα Μαντίθεος καὶ Ἀψεφίων ἐπὶ τὴν ἐστίαν ἐκαθέζοντο, ἰκετεύοντες μὴ στρεβλωθῆναι ἀλλ' ἐξεγγυηθέντες κριθῆναι. μόλις δὲ τούτων τυχόντες, ἐπειδὴ τοὺς ἐγγυητὰς κατέστησαν, ἐπὶ τοὺς ἵππους ἀναβάντες ὤχοντο . . . καταλιπόντες τοὺς ἐγγυητὰς, οὓς ἔδει (ἐν) τοῖς αὐτοῖς ἐνέχεσθαι ἐν οἷσπερ οὓς ἠγγύησαντο.

the promisee in case the convention was not carried out or some condition remained unfulfilled. This is the so-called *μεσεγγύη* practised chiefly in cases when a recourse to justice would have been impossible or beset with difficulties. Lysias tells, for instance, that Ergokles deposited three talents with a "middleman" (*μεσέγγυος*) on condition that they should be paid to certain pleaders in the case of his acquittal.¹

Gage and mortgage.

Another way of ensuring the fulfilment of obligations is the pledging of goods or landed estate as a security. The gage (*ἐνέχυρον*) in Greek law was used approximately in the same way as the *pignus* in Rome. It was pledged usually as a material equivalent of a debt. The delivery of symbolic objects, characteristic of the German *wed*, did not develop in a corresponding manner in Greece. The juridical consequences of the taking of a gage are derived by necessity from the transfer of the object from the debtor to the creditor: its possession passes to the latter, while property remains with the debtor so long as he has not transgressed the term set for repayment.²

A much more interesting situation arises when the material security consists in the delivery of a landed estate, or when chattels are pledged on the same conditions as are usually operative in the case of landed estates. Greek law developed in this direction two interesting institutions—the *πρᾶσις ἐπὶ λύσει* and the *ὑποθήκη*. These forms differ from the ordinary gage (*ἐνέχυρον*) in two respects: in the case of the sale conditioned by possible repayment the property of the plot or of the goods passed to the creditor and the loan assumed the aspect of a sale in which the risks attending the transaction were borne by the creditor, who on the other hand obtained provisional possession and exercised the rights of an owner. This meant, for instance, that if a ship was sold in this manner, as happened in the case treated by Demosthenes in his speech against Apaturios,³ and this ship suffered shipwreck while held by the creditor, the debtor would be absolved from

¹ LYSIAS, XXIX, § 6.

² BEAUCHET, IV, p. 177.

³ [DEM.] XXXIII.

the payment of the debt. Nothing indicates, however, that he might claim compensation for the loss of surplus value, unless a special clause of the convention guaranteed such compensation.¹ The estate sold in this way could be sold further by the purchaser, who exercised in this case his right of free disposal, and the debtor could not prevent the sale, which did not, however, affect the condition of possible resumption within the agreed term.²

The *ὑποθήκη* is based, on the contrary, on the retention of ownership and possession by the debtor, so that the right of the mortgagee comes into operation only when the mortgagor has infringed the stipulations of the loan, e. g. when he has failed to make the payment within the agreed term (*ὑπερημερία*). Very commonly the *ὑποθήκη* was employed in order to secure to the wife the restitution of dowry in case of divorce,³ and sometimes, on the contrary, the payment to the husband of the *dos profecticia*, the dower settled on a bride by her parents. Another common case arose from the obligation imposed on the guardians of orphans to secure the property rights of their wards by a corresponding mortgage.⁴ In these eventualities the economic background of the transaction is sufficiently apparent. It was not in the interest of the obligees to liquidate abruptly the obligation, which would on many occasions remain as it were in suspense while the parties concerned lived and worked in good harmony. At the same time the imposition of the mortgage served as a guarantee in case of a disruption or disturbance of harmonious co-operation. In the same way hypothecary liability arose naturally in the case of leaseholders and lodgers, who were not deprived of the use of their chattels by the City or by landlords, but had generally to submit to the liability of the effects introduced by them into the farm or the lodging for the punctual carrying out of the conditions as to rent, terms, improvements, &c. Altogether the *ὑποθήκη* arose, as its name indicates, from the imposition of certain burdens on a constituted economic organization.

¹ LIPSIUS, pp. 703 ff.

² *Ibid.*, pp. 692 ff.

³ *I. J. G.*, I, vi, *Register of Mykonos*, pp. 49 ff.

⁴ LIPSIUS, 520 ff.

Origins of
ὑποθήκη.

This being so, it seems to me that the much debated question as to the origins of the law of mortgage¹ and the relative priority of the ὑποθήκη or the πρᾶσις ἐπὶ λύσει has to be decided in favour of the former. It is impossible, of course, to maintain dogmatically that both methods could not have been used at the same time independently of each other. But the hypothecary mortgage agrees better with the historical evidence bearing on indebtedness in the early period. The most detailed account we possess in this respect is derived from the story of Attika before Solon and of the reforms which put an end to the "enslavement of the Attic land".² It is stated specifically that the holdings of the peasantry were crushed by the weight of the stone slabs bearing record of the debts, and it is difficult not to recognize in these ὄροι the hypothecary muniments familiar to epigraphists.³ The σεισάχθεια cannot have consisted in the redemption (λύσις) of estates sold to satisfy creditors, because one of the main reasons of the crisis consisted in the fact that holdings could not be alienated by sale. This legal obstacle was removed by Solon's legislation, and land was henceforth mobilized, but the plots crushed by the ὄροι had never been sold, and could therefore not be redeemed.⁴ We are driven to infer that the debts imposed on them had accumulated in the form of increasing rents and arrears, and that the liberation consisted both in the annulment of part of these rents, and in the possibility of treating land for purposes of securing loans in a manner similar to chattels, as an ordinary ἐνέχυρον, or by the expedient of a sale on condition of redemption (πρᾶσις ἐπὶ λύσει = *mancipatio fiduciae causa*).⁵

¹ HITZIG, *Griechisches Pfandrecht*; SZANTO, *Wiener Studien*, IX; BEAUCHET, *op. cit.*, III, 187; LIPSIVS, pp. 696 ff.

² SOLON, *Poetae lyrici Graeci* (Bergk), II, Fr. 36. PLUTARCH, *Solon*, c. 15.

³ Cf. *I. J. G.* I, viii, pp. 107 ff.

⁴ What is one to make of the anecdote related by Aristotle, *Ath. Const.* c. 6, about the παλαιόπλουτοι—Solon's friends who invested money in loans because they knew about the coming reform in land-law? Such stories do not inspire much confidence as a rule. As the term παλαιόπλουτοι is well established, however, it may have been used to designate a group of families which derived their wealth from the acquisition of estates burdened with hypothecary obligations.

⁵ So far I agree with BEAUCHET (III, p. 185), who, however, denies the existence of all kinds of hypothecary securities before Solon.

Certain considerations appear to militate against such an interpretation. Hypothecary arrangements of the kind just mentioned would be devoid of the principal and final guarantee stipulated on behalf of the creditor—namely his right to foreclose: as the holding engaged was inalienable it could not be passed on to the lender in the event of the insolvency of the debtor. The argument against alienation by sale seems to tell equally against alienation by foreclosure. The inference is unavoidable as regards mortgage in its well-known later form. But the corresponding consequence was only drawn exceptionally in ancient law, as we can gather from a notice of Aristotle,¹ who ascribed a special prohibition of the kind to Oxylos, the legendary companion of the Heracleidae. But the argument would not apply against the admission of an earlier transitional use of the *hypotheca* in the sense of a real burden engrafted on the holding. The existence of some arrangement of that kind seems required by the juridical and economic conditions attributed to the epoch before Solon and to his reformatory action. There can hardly be a doubt that the land was distributed in inalienable family holdings (*κλήροι*). If so, the Aristotelian saying *ἡ δὲ γῆ πάντα δι' ὀλίγων ἦν* meant simply that the soil was in the control of a few. It can be reconciled with the existence of inalienable family holdings by the assumption of a semi-servile condition into which a large part of the owners of *κλήροι* had lapsed in consequence of indebtedness. And here the notion of a dependence based on a kind of predial servitude, inherent to the soil, involving heavy rent, and secured by inscriptions on *ἄροι*, appears as the only compromise fitting the situation and corresponding in its various parts with well attested facts. The regulations of Solon as to a timocratic distribution into four classes are in no way opposed to the view advocated in the above paragraphs. Solon never attempted to start from a clean slate. He had to reckon with a society in which social inequalities had come to play a great part, although the differences could not be estimated properly by the size of estates. He graduated the classes according to standards of income

¹ *Pol.* VIII (VI), 1319 a, 12.

which, at the outside, were calculated on a very modest scale. How many of the *πεντακοσιομέδιμνοι* were really large landowners, and how many only ranked on an equal footing with them we cannot say, nor is it possible to make out how far the division into classes was prepared in the previous social order by an unequal distribution of shares among the *πολύκληροι* and ordinary *ζευγίται*. The sixth chapter of Aristotle's *Athenian Constitution* inspires confidence in no one. I should like to suggest that the divergent development of *fiducia* and *pignus* in Roman law may have been connected with the early expansion of Rome on Italian soil. The social struggle between patricians and plebeians reflected originally in the institution of *nezum* did not lead to the imposition of hypothecary *ὄροι*, but was turned off into the channel of conflicts as to the occupation of *ager publicus*.

Modern writers familiar with the definite and complex institutions of lease and mortgage have failed to describe with sufficient precision the rudimentary and transitional species of security found in Greece, but they have supplied us with all the component elements of the combination.¹

A second difficulty concerns the diffusion of the hypothecary mortgage through Greece. It was of course by no means restricted to Attika. We get glimpses of it at Delphi, in Naxos, in Lemnos, in Halikarnassos, in Delos, in Kos, in Thera, in Cumae, etc.² How is it to be explained that an institution of general application should have had a development so closely conditioned by events of Athenian history? The answer to this should be, I think, that apart from the immense influence of Athens in shaping later Greek law—an influence that would go far to account for many late developments—there was a similarity of circumstances and social requirements in the Greek world at large which suggested similar juridical devices. Solon's

¹ SZANTO, *Wiener Studien*, IX, came near the solution indicated in the text: he regarded the *ὑποθήκη* and the *πρᾶσις ἐπὶ λύσει* as independent of each other, and derived the first from the earlier form of personal liability. In my opinion the liability became predial before Solon.

² *I. J. G.* I, viii, pp. 107 ff.

reform of land law, for example, appears to have been preceded by the similar legislation of Charondas in Magna Graecia.¹ The struggle of the Demos against landed aristocracy was, of course, by no means peculiar to Athens, and presented obvious points of analogy in all cities where the *geomoroi* tried to defend the position against the oncoming tide of the Demos.

The problems of agrarian indebtedness and of the securities obtained by landed capitalists were certainly to the fore in most States that had a considerable rural population. The solutions of these problems, without being identical, must have moved very much on similar lines, and the provision of securities based on real estate without dispossessing the peasant population was obviously one of the most convenient expedients. The generalization of legal rules as to hypothecary mortgage must have taken place at a later period.² As in the case of transfer of landed property, the establishment of mortgages and fiduciary sales (*πράσις ἐπὶ λύσει*) of all kinds was commonly safeguarded against abuses and infringements by public proclamations and registration.³

It lies outside the scope of this survey to consider the much-debated subject of the influence of the Greek law of mortgage on Roman law.⁴ The only remark which I should like to make in this connexion refers to the evidence supplied by the use of the term *hypotheca* for the continuity of Greek customs under Roman rule. The statements of Gaius and of Marcian prove, if nothing else, that the practice of securing interests by obligations imposed on estates rather than on persons using them had its popular roots in the economy of the Hellenized East.

3. *Lease and Sale.*

It would be out of the question to discuss the details of the Greek law of contract, as embodied in the various species of conventions. The rules inserted in the speeches

¹ AR. Pol. II, 1274 a.

² Beauchet's theory requires a similar surmise.

³ E. g. the *Register of dowers at Mykonos*, I. J. G. I. vi.

⁴ R.-Enc. X, 343 ff.

of orators and commented on by them are to a great extent technical and suggested by various political and economic conditions rather than by considerations of juridical doctrine. They are discussed with much learning in the leading works on Greek law, such as those of Caillemer, Beauchet, Meier and Schömann, Lipsius, Hitzig, &c., but it would be impossible to fit these details into a scheme of jurisprudence. I do not attempt, therefore, to pass in review all the known classes of conventions—debt, deposit, mandate, partnership, contract of service (*locatio operarum*), and I may perhaps plead in extenuation of this omission that the Greeks themselves did not differentiate much between the various conventions in their organization of procedure. The main action was common to all: it was the *δίκη συνθηκῶν παραβάσεως*. But it will help us to grasp the leading ideas of the law of contract if we look somewhat more closely to the working of two important varieties of that department—the law as to leases and the law of sale.

Ordinary
leases.

The transfer of the use of houses, land, or chattels by their owner to other persons was widely practised in Greece, and the rules governing such transactions were very similar to those obtaining in Roman law. When the surrender of the right of usage was compensated for by payments in money or in kind, there arose the contract of lease and hire (*locatio conductio*), of which we have many illustrations in epigraphic documents and some in forensic speeches. Almost all the extant examples deal with the property of cities, of demes, of phratries, and other associations, or with estates belonging to temples, but this is only accidental and depends on the fact that juridical persons were bound to manage business in a more circumstantial and formal way than private persons. The conventions of the former were generally engraved on stone, while the agreements between private persons were usually written on tablets and therefore had not the same chance of surviving. The care with which conveyances as to temple property or public property were formulated and recorded shows that the formal side of such conventions was by no means overlooked or neglected. In spite of the fact that there were no specific

requirements as to the conclusion of a lease and that the contract was formed by the agreement between the parties and the concurrence of their wills, there were two aspects of such a transaction which involved definite conformity to certain rules and requirements. To begin with, it was necessary to determine with precision the capacity of the lessors to act in the matter as well as the extent of their right of making a valid agreement. The question did not arise in this form in the case of private owners, but it recurs over and over again in the inscriptions recording conventions in which one of the parties was a moral person. A city, a deme, a temple were abstractions unless represented by definite plenipotentiaries, and such plenipotentiaries were either certain magistrates or specially designated commissioners,¹ or even the people of the city or association in their lawfully constituted assembly.² Apart from that the conventions are often framed in such a way as to refer for authority to some general regulations passed on the subject.³ These features do not affect the freedom of agreement between bailor and bailee, but they put into a strong light a point which is sometimes slurred over in the usual treatment of contractual relations in Greek law. Whatever stress we may lay on the consensual character of Greek conventions, we must not forget that the Greeks were very much alive to the necessity of clothing their agreements in definite forms and providing them with conclusive proofs so as to preclude as much as possible misinterpretation and misunderstandings. They did not labour the problem of the *causa* in contract, but they attached a great deal of importance to practical measures devised to safeguard a strict fulfilment of obligations. For this reason, although there is ample evidence as to the consensual essence of the contract of lease, there are also occasions when oaths⁴ or the testimony of witnesses⁵ are mentioned

¹ BEAUCHET, *op. cit.*, IV, 163 f.

² For instance, *I. J. G.* I, xiii², p. 238. *Leases of the deme of Aixone.*

³ HOMOLLE, *Les archives de l'intendance sacrée à Délos*, p. 1194; *Bull. de correspondance hellénique*, VI, 63 ff.; XIV, 421 ff.

⁴ HAÛSSOULLIER, *Bull. de corr. hell.* III, 253.

⁵ See above, p. 237.

as important for the conclusion of a proper agreement of this kind: while, on the other hand, the drawing up of an instrument is considered to be so important that the parties,¹ especially the lessors, take elaborate and costly measures to ensure publicity by inscriptions.

Turning to the contents of Greek leases, it is to be observed that the rule expressed by the German proverb "Kauf bricht Miete", "sale prevails over lease", seems to have obtained in Greece as well as in Rome in the absence of a specific agreement to the contrary. This may be inferred *e contrario* from occasional prohibitions to the lessor to alienate while the lease was running.² The obligation of the lessor to warrant the possession of the lessee against third persons was, naturally, admitted. But it depended on the lessee to decide whether he preferred for the sake of an expeditious settlement to assume himself the position of defendant (*ἀυτομαχεῖν*)³ or to call on the lessor to enter the lists against eventual claimants. If the estate was damaged by *vis major*, as for example by an incursion of enemies, the lessor had to bear part of the ensuing loss: in the Aixone lease, e.g., half the rent is remitted in such circumstances.⁴ On the other hand the cultivation of the plots is not only to be carried on in accordance with customary standards of efficiency, but is often regulated by special and minute rules⁵ and supervised by representatives of the lessor.⁶ It may be surmised that at the conclusion of the lease the owner could claim compensation from the lessee for any deterioration or loss caused by the latter's negligence. No evidence is extant as to a possible counter-claim on the part of the tenant on the ground of improvements brought about by his industry and care.

Varieties
of leases.

Leases may assume forms varying with the prevailing economic and social conditions. It is easy to distinguish four principal varieties in this respect: leases at rack rents to be

¹ DEM. XLV, § 31.

² BEAUCHET, *op. cit.*, IV, 168 f.

³ *Ibid.*, IV, 136 ff.

⁴ *I. J. G.* I, xii, p. 204, § 8.

⁵ *Ibid.*, xiii², p. 238, § 3.

⁶ *C. I. A.* II, 600; *I. J. G.* I, xii, p. 204; I, 120 ff.

paid either in money or in kind, stock and farm leases (*bail à chaptel*), leases for part profit (*métayage, colonia partiaria*), and emphyteutic tenancies. Greek evidence is chiefly concerned with the first and the last varieties. Apart from archaic cases like that of the Attic *ἐκτῆμοροι*, who may have been partly tenants and partly heavily indebted peasant owners, or that of customary tenants of the type of the Kretan *φοικῆες* or the Thessalian *πενέσται*, we hardly ever hear of farmers receiving their outfit from landowners or dividing the produce of their agricultural labour to acquit their rent.¹ This does not mean that such arrangements were unknown, but that they did not come, as a rule, under the notice of the engraved records and of the city Courts: such as there were must have been transacted mainly by verbal and customary agreements. On the other hand we get plenty of information as to conventional rack rents and as to emphyteutic long leases. The former are the natural outcome of a lively cash intercourse produced by the commercial husbandry of the cities, and it is with them that students of inscriptions mostly have to deal. As for the third variety of leases, their main features have been briefly considered in the preceding chapter.²

In the case of the contract of sale we have the advantage of getting a short but systematic survey of its most important points from the work of Aristotle's pupil Theophrastos. In the XVIIIth and possibly in the XVIIth book of his *Laws* he treated of this subject, and a few pages of his exposition have been preserved for posterity by Stobaeus.³ Modern inquirers can hardly do better than follow Theophrastos' text, supplementing with such information as may be gathered from the inscriptions and pleadings that bear on the matter of sale.

The fragments of Theophrastos.

The first point noticed is the publicity of sales and of hypothecary conventions.⁴ Theophrastos describes regis-

¹ *I. J. G.* I, xii, p. 200, § 1.

² See above, p. 217f.

³ THEOPHRASTOS, *Περὶ συμβολαίων*; STOBÆUS, *Florilegium*, XLIV, 22, ed. Meineke, II, 166 ff.

⁴ *Ibid.*, p. 166, ll. 4 ff. οἱ μὲν οὖν ὑπὸ κήρυκος κελεύουσι πωλεῖν . . . οἱ

tration as the most perfect method of ensuring the transfer of title, but mentions also various other devices, such as proclamation by a herald sixty days in advance, or proclamations on five consecutive days preceding the sale, or the payment of a small coin to three neighbouring householders in order that they should be able to testify to the bargain.¹ These proceedings are intended to establish in a definite manner the act of transfer, to secure for the purchaser the possibility of a recourse to official documents or, at least, to trustworthy witnesses. On the other hand they call for objections and challenges if any one wants to produce them. What is even more important, the procedure is not a mere reflection of the wishes of the consenting parties. It amounts to certain positive requirements which though not distinctly stated may be easily surmised. The officials superintending registration have the right and the duty to refuse the performance of this act if the formalities of the procedure have not been properly carried out;² and we may add, on the strength of the Halikarnassos and Iasos inscriptions,³ that confirmation is not a mere question of form: the *mnemones* mentioned in these documents are taking a prominent part in the conclusion of the convention, and a late example from the Roman epoch provides an illustration of this kind of public supervision.⁴ In other words, the formalities of public proclamation and registration gave scope for the exercise of a certain public supervision which did not amount to a denial of the fundamental doctrine of convention by consent, but made it possible in certain cases to veto negligent or fraudulent agreements.

It cannot be said that such interference was equally effective in all Greek cities—it was reduced to the very

δὲ παρ' ἀρχῆ τινι . . . ἔνιοι δὲ προγράφειν παρὰ τῇ ἀρχῇ πρὸ ἡμερῶν μὴ ἑλιπτον ἢ ἑξήκοντα . . . ὅπως διαμφισβητήσῃ τε ἑξῆ καὶ διαμαρτύρασθαι τῷ βουλομένῳ, καὶ ὁ δίκαιος ἔωνημένος φανερός ἢ τῷ τέλει.

¹ THEOPHR., *loc. cit.*, l. 16 Οἱ δὲ Θουριακοὶ . . . κελεύουσι κοινῇ τῶν γειτόνων τῶν ἐγγυτάτω τρισὶ νόμισμά τι βραχὺ μνήμης ἕνεκα καὶ μαρτυρίας.

² *Ibid.*, p. 167, l. 13. After enumerating various regulations, he says ἀνευ δὲ τούτων μὴ ἐγγράφειν τὴν ἀρχήν.

³ *I. J. G.* I, i, 1 ff; *DITT. Syll*³ I, 169.

⁴ *CICERO, Pro Flacco*, cc. 29-32.

attenuated expedient of proclamation in Athens—but it must have been sufficiently general and useful, as Theophrastos has given it so large a place in his treatise.

Another guarantee of good faith was sought in an oath imposed on the contracting parties in affirmation of the genuineness of the transaction and the absence of collusion or fictitious pretence.¹

A strong light is thrown on the importance of the official confirmation of transfers by the Tenos registration list.² It is not by any means a mere enumeration of concluded agreements. Under cover of a register of sales it confirms varied transactions cast in this form on account of its convenience for establishing title and discouraging claims by third parties.³ Some of the sales mentioned in it are in reality redemption instruments consequent on the *πράσις ἐπὶ λύσει*. Others are disguised constitutions of dower. A third variety, represented by § 13, arises from execution of a judgement by the defeated party: a certain Anaxikles is said to have bought a plot of land from Philothea, who, it is explained, had lost the above-mentioned plot in a suit against the purchaser.⁴ The entry nevertheless mentions a *πράτωρ* as guarantor. In ordinary cases the *πράτωρ* is a previous owner from whom the estate had been acquired by the actual vendor; in other words, transfer by purchase is traced one step higher, greater security being sought by calling in a second *uuctor*. It is difficult to guess to whom the designation of *πράτωρ* could apply in the case under discussion; it must have been a person who had passed property to Philothea, so that she must have had a transfer to rely upon in spite of the fact that she lost in the trial: she may have forfeited her right in consequence of the foreclosure of a mortgage. Yet the transaction with Anaxikles was clothed in the form of a fictitious contract of sale between the latter and Philothea.⁵

¹ THEOPHR., *loc. cit.*, p. 167, ll. 6 ff.

² *I. J. G.* I, vii, pp. 63 ff.

³ *Ibid.*, pp. 89 ff.

⁴ *Ibid.*, § 13, pp. 68 f. 'Αναξικλῆς . . . παρὰ Φιλοθέας . . . ἐπρίατο τὰς ἐν Σαπήθῳ αἰμασιὰς τέτταρας (description) . . . gap in text . . . περὶ ὧν ἐνίκησεν Ἀναξικλῆς Φιλοθέαν τὴν δίκην' πρᾶτωρ Ἀριστοκλῆς Πολυξένου. . .

⁵ *Ibid.*, p. 91.

Another indication as to the importance of these registered transfers of title is afforded by the part assigned to the guarantors or sureties—the *ἐγγυηταί* or *πράτορες*. They are constantly mentioned at the end of the entries on the register, and their obligation was not merely a formal or accessory one. The responsibility for the legality and firmness of the bargain¹ rested primarily on them. In case of eviction the purchaser had a recourse against them or, at least, as much against them as against the vendor himself.² To judge from the analogy of the guarantors of the fictitious sales of emancipated slaves at Delphi these persons were usually drawn from among the most wealthy and influential citizens of a given city. Their consent to act as patrons to the transaction presented an additional asset for the security of title, and was evidently much in demand for the conclusion of conventions.

Conclu-
sion of
sale.

The second point discussed by Theophrastos concerns the conclusion of the sale. He says that in most cities the contract was deemed perfect on the payment of the price, not before. A presumption was created, however, by a preliminary agreement confirmed by the payment of earnest money.³ If the purchaser subsequently refused to pay the price the convention was annulled and he lost the deposit.⁴ In the converse case, when the vendor subsequently refused to deliver the property although the agreed price was tendered to him, there arose the question whether he was liable to restore a sum of money equivalent to the price which had been agreed on and, perhaps, also the deposit. Such a solution does not appear to be equitable, but was seemingly resorted to by some legislators, as Theophrastos describes it in some detail. It has been argued that the payment of earnest money presented a formal requirement of the contract of sale.⁵ Theophrastos, however, does not

¹ *I. J. G.* I, vii, § 41, cf. p. 100.

² PLATO, *Laws*, XII, 7, *init.*

³ THEOPHR., *loc. cit.*, p. 167, ll. 17 ff. *κυρία δὲ ἡ ὄνη καὶ ἡ πρᾶσις εἰς μὲν κτήσιν ὅταν ἡ τιμὴ δοθῆ καὶ τὰκ τῶν νόμων ποιήσωσιν, οἷον ἀναγραφὴν ἢ ὄρκον ἢ τοῖς γείτοσι τὸ γινόμενον· εἰς δὲ τὴν παράδοσιν καὶ εἰς αὐτὸ τὸ πωλεῖν ὅταν ἀρραβῶνα λάβῃ· σχεδὸν γὰρ οὕτως οἱ πολλοὶ νομοθετοῦσιν.*

⁴ *Ibid.*, pp. 167 f., l. 30 *εἰάν δὲ λαβῶν ἀρραβῶνα μὴ δέχεται κτλ.*

⁵ ΒΕΑΥΣΗΤ, IV, 426.

indicate anything of the sort. His statement is chiefly directed towards establishing the consequences of an eventual renunciation of the agreement.

A third point consists in the requirement that the consent given by each of the parties should be given in sound mind; a convention concluded in anger, in jealousy, or in a state of insanity is declared to be invalid.¹ This necessary provision opened the way to many disputes in the Courts, and we have an excellent illustration of the way in which it could be used by a skilful pleader in Hypereides' speech against Athenogenes. The validity of the sale of a perfumery shop was impugned in spite of the fact that the vendor had carefully secured witnesses of the transaction and a sealed instrument to confirm it. The arguments of Hypereides are derived from observations as to the psychology of amorous persons of weak character under the influence of deceitful women charmers:² they are strengthened by an express reference to one of Solon's restrictions on the freedom of testamentary disposition, by which the *γυναικὶ πειθόμενος* is regarded as incapable of a reasonable decision. There was no assertion of *lesio enormis* in the Roman sense, but of a flaw as regards the free consent (*ὅσα τις ἔκων ὁμολογήσῃ*). We may think what we like about Hypereides' arguments, but the fact of his using them before the Court proves that the validity of conventions could be attacked from the point of view of lack of sound mind, shown in an unreasonable resolve.

A last question put by Theophrastos is whether the Credit. property remains with the vendor until the full price has been paid. He notes the radical solution laid down by Charondas and recommended by Plato in the *Laws*. According to these legislators an actionable sale was only effected when the price had been paid, so that if some one sold on credit he had to rely exclusively on the good faith of the purchaser.³ There can be no doubt, however, that in

¹ THEOPHR., p. 167, ll. 23 ff., ending l. 27 *ἔοικε γὰρ ἐκ καιροῦ τὰ τοιαῦτα καὶ πάθους γίγνεσθαι· δεῖ δὲ ἐκ προαιρέσεως· οὕτω γὰρ ἔσται τὸ δίκαιον.*

² HYPER. III (V), § 17.

³ THEOPHR., *loc. cit.*, p. 168 *παρ' ἐνόμοις δεδικάσθαι κελεύουσι τῷ μὴ δεχομένῳ τὴν τιμὴν. πότερον δὲ ἔως ἂν κομίσῃται κύριον εἶναι τοῦ κτήματος;*

most of the Greek States credit was recognized and practised to a large extent. Commercial intercourse on the scale on which it was carried on in Athens or Syrakuse could not have existed without it.¹ It must have been extensively used in the sale of goods; as to landed estate, it was easy to protect it by bonds, and all considerable transactions in this branch must have been carried on by means of instruments of some kind. The chief means of providing against bad faith and fraud in connexion with goods was to transact sales in the open market under the supervision of the city's officers. The administrative organization of Athens was much developed in this respect. Chapter LI of Aristotle's *Athenian Constitution* gives many details on the functions of the *ἀγορανόμοι*, the *μετρονόμοι*, and the *σιτοφύλακες*. They exercised a very close supervision over the quality of the products sold, the exactitude of the weights and measures used, and the fulfilment of conditions imposed by laws and regulations in regard to trade.²

It may be said in conclusion that the treatment of conventions is highly characteristic of the general tendencies of Greek jurisprudence. It combines in a striking manner the fullest possible development of private initiative and freedom of decision with the constant intervention of the City. Archaic formalism disappeared at an early stage, but the practices of instruments in writing and of registration by magistrates developed steadily, and came to provide the common foundation of title. Nevertheless, even after the spread of these practices of literal evidence, conveyances and conventions were considered and adjudicated upon in the last resort by tribunals which were always disposed to

οὕτω γὰρ οἱ πολλοὶ νομοθετοῦσιν, ἢ ὥσπερ Χαρώνδας καὶ Πλάτων; οὗτοι γὰρ παραχρῆμα κελεύουσι διδόναι καὶ λαμβάνειν· ἐὰν δέ τις πιστεύσῃ μὴ εἶναι δίκην, αὐτὸν γὰρ αἴτιον εἶναι τῆς ἀδικίας.

¹ BUECHSENSCHUETZ, *Besitz und Erwerb im Alterthum*.

² *Ath. Const.*, c. 51 Κληροῦνται δὲ καὶ ἀγορανόμοι, . . . τούτοις δὲ ὑπὸ τῶν νόμων προστέτακται τῶν ὀνίων ἐπιμελείσθαι πάντων, ὅπως καθαρὰ καὶ ἀκίβδηλα πωλήσεται. κληροῦνται δὲ καὶ μετρονόμοι, . . . καὶ οὗτοι τῶν μέτρων καὶ τῶν σταθμῶν ἐπιμελοῦνται πάντων, ὅπως οἱ πωλοῦντες χρῆσονται δικαίως. ἦσαι δὲ καὶ σιτοφύλακες κληρωτοί. . . οὗτοι δ' ἐπιμελοῦνται πρῶτον μὲν ὅπως ὁ ἐν ἀγορᾷ σίτος ἀργὸς ὄνιος ἔσται δικαίως, ἔπειθ' ὅπως οἱ τε μυλωθροὶ πρὸς τὰς τιμὰς τῶν κριθῶν τὰ ἄλφита πωλήσουσιν κτλ.

take into consideration the spirit rather than the letter of laws, the equity and utility of business transactions rather than their technical requirements. Public opinion in the city—the *δόξα τῆς πόλεως*—was in the last resort the decisive authority in the application of rules of private as well as of public law.

At the close of this survey of the methods of Greek Summing
 juridical thought it may not be amiss to sum up certain ^{up.}
 points of comparison between the jurisprudence of our own days and that of classical Greece. Rules of law are rules of conduct, and therefore they are necessarily surrounded by an atmosphere of morality: with the Greeks the connexion between ethics and the administration of justice was especially close and productive of direct results. The distinction between external acts and inward intention could not fail to express itself in practice, but it was not prominent in theory, and the spiritual aspects of human conduct—forethought, motive, character—were insisted upon whenever possible in estimating actions. Compulsion was regarded as a natural outcome of social life—the most advanced thinkers felt as little hesitation in chastizing or crushing a malefactor as they felt in fighting a wolf or training a dog. Combines for the achievement of common purposes—both transient and enduring—grew up in exuberant profusion and commonly developed mystic elements as expressions of superindividual aspirations. Corporate life was represented in all kinds of varieties—in political intercourse as well as in business and culture. But in all corporations or quasi-corporations the opposition between the individuals and the collective body uniting them was not insisted upon: on the contrary, the city and any gild or group of worshippers were considered as identical with the members which constituted them for the time being. The concentration of the State within the narrow limits of a city made it possible to attempt government by direct action of the people. Actual democracy was, however, restricted to a comparatively small number of privileged citizens, selected on the basis of descent. While rules of expediency and agreement governed the

relations between members of different cities, a rule of law was consistently applied to the relations between citizens. In apportioning rights and duties, in delimiting interests, in enforcing obligations, Greek law strove not only to maintain order and to redress grievances, but also to guarantee a just distribution of advantages and burdens. The public character of property and possession was manifested in various legal requirements, while private acquisition and rights of disposal were chiefly developed in the course of business practice and did not give rise to rigid doctrinal distinctions. In keeping with this fluid state of the law of things, transactions and conventions came at an early stage to be established by formless consent. This did not prevent the growth of customary usages as to evidence, in which written instruments were assigned a most important part, and in this way a new kind of literal contract was gradually evolved. In all departments of law stress was laid on public opinion, express or implied. All kinds of devices were used in order to secure preponderance to enacted law, but as a matter of fact in many cases government and the administration of justice depended on more or less spontaneous decrees and on equitable estimates of circumstances. There was as yet no call for natural law as opposed to professional legality, but there was ample room for speculations as to a common law of reason rising above the precepts of single cities.

BOOKS REFERRED TO IN VOL. II

A. *Abbreviated Titles used in footnotes: see list B for details.*

- Beauchet.** Droit privé.
C. I. A. Corpus Inscr. Att.
C. I. G. Corpus Inscr. Gr.
Dar. et S. Dictionnaire des antiquités gr. et rom.
Diels. Fragm. der Vorsokr.
Ditt. Syll. Inscr. Gr.
Gercke und Norden. Einleitung.
Glötz. Solidarité.
Hermann-Swoboda, Hermann-Thalheim, Hermann-Thumser. *See Hermann, Lehrbuch.*
Hicks. Gr. hist. inscr.
I. J. G. Rec. des inscr. jurid. gr. **Daresté.**
Lipsius. Att. Recht.
Michel. Rec. des inscr. gr.
R.-Enc. **Pauly-Wissowa.**
Schömann-Lipsius. Griech. Alterth.
Z. SS. Zeitschrift der Sav.-Stift.

B. *Full Titles.*

- Abhandlungen der . . . K. sächs. Gesellschaft der Wissenschaften. *See* **Mitteis.**
- Aischines.** Speeches. Blass. Teubner.
Aischylos. Plays. Sidgwick. Script. Class. Bibl. Oxon.
American Journal of Archaeology. *See* **Dennison Rogers** and **Wheeler.**
- American Journal of Philology. *See* **Morris.**
- Amira (K. von).** Nordgermanisches Obligationenrecht, Bd. III. Strassburg. 1897. Grundriss der germanischen Philologie. 1913.
- Andokides.** Speeches. Blass. Teubner.
Antiphon. Speeches. Blass. Teubner.
Antiphon the Sophist. *In* Oxyrhynchus Papyri, XI. Ed. B. P. Grenfell and A. S. Hunt. Egypt Exploration Fund. London. 1915.

- Aristotle.** Atheniensium Respublica. F. G. Kenyon. Oxford. 1920.
- *Πολιτεία Ἀθηναίων.* G. Kaibel et U. de Wilamowitz-Moellendorff. Berlin. 1898.
- Ethics (Nik.). I. Bywater. Oxford. 1890.
- Politics. W. L. Newman. Oxford. 1887-1902.
- Rhetoric. E. M. Cope. Camb. 1877.
- Other works. Bekker.
- Beauchet (L.).** Histoire du droit privé de la République athénienne. Paris. 1897.
- Beloch (K. J.).** Griechische Geschichte. Strassburg. 1893.
- Boeckh (A.).** Die Staatshaushaltung der Athener. 3te Aufl., M. Fränkel. Berlin. 1886.
- Brandileone (F.).** Sulla supposita obligatio litterarum nell' antico diritto greco. Bologna. 1920.
- Büchenschütz (—).** Besitz und Erwerb im Alterthum. Halle, 1869.
- Buckland, W. W.** A Text-Book of Roman Law. Cambridge. 1921.
- Bürgel.** Die pyläisch-delphische Amphiktyonie. München. 1877.
- Bulletin de correspondance hellénique. *See Haussoullier, Homolle.*
- Burnet (J.).** Ethics of Aristotle. London. 1900.
- Busolt (G.).** Der zweite attische Bund. Jahrbücher für Philologie, Suppl.-B. VII, 665 ff.
- Bywater (I.).** Heracliti Reliquiae. Oxford. 1877.
- Caillemer (E.).** La prescription à Athènes : études sur les antiquités juridiques d'Athènes, No. 7. Paris. 1869.
- Le droit de succession légitime à Athènes : études sur les ant. jur., etc. Paris, 1879.
- *In Dar. et S., s.v. diadikasia.*
- Calhoun (G. M.).** The early history of crime and criminal law in Greece, *in* Proceedings of the Classical Association, vol. XVIII (1921). London. 1922.
- Oral and written pleadings in Athenian Courts, *in* Transactions of the American Philological Association, vol. I (1919), pp. 177 ff.
- Cloché (P.).** Le conseil athénien des cinq cents et la peine de mort, *in* Revue des études grecques, XXXIII. 1920.

- Cope (E. M.).** Commentary on Aristotle's Rhetoric. Ed. J. E. Sandys. Cambridge. 1887.
- Corpus Inscriptionum Atticarum.** I. A. Kirchhoff. Berlin. 1873. II. U. Köhler. Berlin. 1877.
- Corpus Inscriptionum Graecarum.** A. Boeckh, etc. Berlin. 1828-77.
- Corpus juris civilis.** P. Krüger and Th. Mommsen. Berlin. 1893.
- Cuq (É.).** Les institutions juridiques des Romains. Paris. 1904.
- Daremberg (C.) et Saglio (E.).** Dictionnaire des antiquités grecques et romaines. Paris. 1873-1917.
- Dareste (R.).** Plaidoyers civils de Démosthène. 1875.
 ———— Du droit de représailles, *in* Revue des études grecques, II, p. 305. Paris. 1889.
 ———— **Haussoullier (B.) and Reinach (Th.).** Recueil des inscriptions juridiques grecques. Paris. 1891-.
- Demosthenes.** Speeches. Blass. Teubner.
 ———— ———— Butcher. Script. Class. Bibl. Oxon. *See also* Weil.
- Dennison Rogers (J.).** Fragment of an Argive Inscription, *in* American Journal of Archaeology, New Series, V, p. 159. 1901.
- Dictionnaire des antiquités gr. et rom. *See* **Daremberg**, etc.
- Diels (H.).** Die Fragmente der Vorsokratiker. 3te Aufl. Berlin. 1912.
- Digest. *See* Corpus juris civilis.
- Dikaiarchos.** *In* Fragmenta Historicorum Graecorum.
- Dikaionata herausg. von der Graeca Halensis. Berlin. 1913.
- Diodorus Siculus.** Histories. Dindorf. Teubner.
- Dittenberger (G.).** Sylloge Inscriptionum Graecarum. 3te Aufl. Leipzig. 1915-.
- Esmein (J. P.).** Mélanges d'archéologie et d'histoire, VIII, p. 426. Rome, Paris. 1888.
- Euripides.** Plays. Murray. Script. Class. Bibl. Oxon.
- Foucart (P.).** Des associations religieuses chez les Grecs. Paris. 1873.
- Fränkel (M.).** Die attischen Geschworenengerichte. Berlin. 1877. *See also* **Boeckh**.

- Fragmenta Historicorum Graecorum.** C. and Th. Muller. Paris. 1841.
- Francotte (H.).** *La polis grecque.* Studien zur Geschichte und Kultur des Altertums, I. Paderborn, 1907.
- Gai** *Institutiones*; with translation and commentary by Ed. Poste. 4th ed. E. A. Whittuck. Oxford. 1904.
- Gellius, Aulus.** *Noctes Atticae.* Hosius. Teubner.
- Gercke (A.) und Norden (E.).** *Einleitung in die Altertumswissenschaft.* Leipzig. 1910.
- Gernet (L.).** *Hypothèses sur le contrat primitif en Grèce,* in *Revue des études grecques*, XXX, p. 249. Paris, 1917.
- Gilbert (G.).** *Handbuch der griechischen Staatsaltertümer.* Leipzig. 1893.
- Girard (P. F.).** *Manuel élémentaire de droit romain.* Paris. 1910.
- Glötz (G.).** *La solidarité de la famille dans le droit criminel en Grèce.* Paris. 1904.
- *Le travail dans la Grèce ancienne.* Paris. 1920.
- Gneist.** *Die formellen Verträge des neueren römischen Obligationenrechts in Vergleichung mit den Geschichtsformen des griechischen Rechts.* 1844.
- Gomperz (Th.).** *Greek Thinkers.* Translated by L. Magnus. London. 1901-12.
- Griechischen Dialekt-Inschriften, Sammlung der.* H. Collitz. Göttingen. 1884.
- Grimm (J.).** *Deutsche Rechtsalterthümer.* 4te Ausg. Leipzig. 1899.
- Guiraud (P.).** *La propriété foncière en Grèce jusqu'à la conquête romaine.* Paris. 1893.
- Harpokration.** *Lexicon in decem oratores Atticos.* Ed. G. Dindorf. Oxford. 1853.
- Haussoullier (B.).** *La vie municipale en Attique.* Bibliothèque des écoles françaises d'Athènes et de Rome. Fasc. 38. Paris. 1884.
- *Inscriptions de Chio: in Bulletin de corr. hell., III, p. 230. See also Rec. des inscr. jurid.*
- Hellenica Oxyrhynchia.* Grenfell and Hunt. Script. Cl. Bibl. Oxon.
- Hermann (K. F.).** *Lehrbuch der griechischen Antiquitäten;*

- neu herausg. von H. Blümer und W. Dittenberger.
I. Abt. 1, 2, V. Thumser. Abt. 3, H. Swoboda.
II. Abt. 1, H. Thalheim. Freiburg. 1889-.
- Herodotos.** Histories. Dietsch-Kallenberg. Teubner.
- Hicks (E. L.) and Hill (G. F.).** Manual of Greek Historical Inscriptions. Oxford. 1901.
- Hildenbrand (K.).** Geschichte und System der Rechts- und Staatsphilosophie. Leipzig. 1860.
- Hillier von Gaertringen (F.).** Inschriften von Priene. Berlin. 1906.
- Hinneberg (P.).** See **Wilamowitz-Moellendorff.**
- Hirzel (R.).** Themis, Dike und Verwandtes. Leipzig. 1907.
- Hitzig (H. F.).** Altgriechische Staatsverträge über Rechtshilfe. Zürich. 1907.
- Das griechische Pfandrecht. München. 1895.
- Hogarth (J. G.).** Naukratis, 1903. *In* Journal of Hellenic Studies. London. 1905.
- Homer.** Odyssey. Allen. Script. Class. Bibl. Oxon.
- Homolle (T.).** Les archives de l'intendance sacrée à Délos. Bibliothèque des écoles françaises d'Athènes et de Rome. Fasc. 49, p. 1194. Paris. 1887.
- Comptes des temples déliens, *in* Bulletin de corr. hell., VI, p. 1, and XIV, p. 389. Paris. 1882, 1890.
- *In* **Dar. et S.**, s. v. *donarium*.
- Hypereides.** Speeches. Kenyon. Script. Class. Bibl. Oxon.
- Isaios.** Speeches. Thalheim. Teubner.
- Isokrates.** Speeches. Blass. Teubner.
- Jebb (R. C.).** The Rhetoric of Aristotle translated. Cambridge. 1909.
- Journal of Hellenic Studies. See **Hogarth.**
- Keil (B.).** *In* **Gercke und Norden**, Einleitung.
- Kenny (C. S.).** Outlines of Criminal Law. Cambridge. 1909.
- Laurent (F.).** Histoire du droit des gens et des relations internationales. Gand et Paris. 1850-70.
- Lécrivain (C.).** *In* **Dar. et S.**, s. v. *epheisis*.
- Leist (G. A.).** Der attische Eigentumsstreit im System der Diadikasien. Jena. 1886.
- Lexica Segueriana, Immanuelis Bekkeri anecdota Graeca, Vol. I. Berol. 1814.

- Lipsius (J. H.).** Das attische Recht und Rechtsverfahren. Meier und Schömann. Leipzig. 1905-15.
 ————— Griechische Alterthümer. G. F. Schömann. 4te Aufl. 1897-1902.
 ————— *In* Z. SS. Roman. Abth., XXXVII, p. 1 (1916), and XXXIX, p. 36 (1918).
- Lykurgos.** Speeches. Blass. Teubner.
- Lysias.** Speeches. Hude. Script. Class. Bibl. Oxon.
- Meier.** *See* Lipsius.
- Meyer (Ed.).** Geschichte des Alterthums. Stuttgart. 1893.
 ————— Forschungen zur alten Geschichte. Halle. 1892-99.
- Meynial (E.).** Des renonciations, *in* Nouvelle revue historique de droit français et étranger. 1900, 1901, 1902, 1904. Paris.
- Michel (C.).** Recueil d'inscriptions grecques. Bruxelles. 1897-1912.
- Mitteis (L.).** Römisches Privatrecht, *in* Systematisches Handbuch der deutschen Rechtswissenschaft. Ed. K. Binding. Leipzig. 1908.
 ————— Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs. Leipzig. 1891.
 ————— Zur Geschichte der Erbpacht im Alterthum, *in* Abhandl. der phil.-hist. Cl. der K. sächs. Gesellschaft der Wissenschaften, XX, no. 4. Leipzig. 1901.
 ————— Romanistische Papyrusstudien, *in* Z. SS., Roman. Abth., XXIII, p. 274 (1902).
- Morris (C. D.).** The jurisdiction of the Athenians over their allies, *in* American Journal of Philology, V, p. 298. Baltimore. 1884.
- Muller (C. and T.).** Fragmenta Historicorum Graecorum. Paris. 1848.
- Nettleship (R. L.).** Lectures on the Republic of Plato. London. 1910.
- Newman (W. L.).** The Politics of Aristotle. Oxford. 1887-1902.
- Nouvelle revue de droit. *See* Meynial.
- Ott (L.).** Beiträge zur Kenntniss des griechischen Eides. Leipzig. 1896.
- Oxyrhynchus Papyri XI.** Ed. B. P. Grenfell and A. S. Hunt. London. 1915.

- Partsch (J.).** Griechisches Bürgerschaftsrecht. Leipzig. 1909.
- Pauly (A. F. von).** Real-Encyclopädie der classischen Altertumswissenschaft. Ed. G. Wissowa. Stuttgart. 1893-.
- Perrot (G.).** Essai sur le droit public d'Athènes. Paris. 1867.
- Philippi (A.).** Der Areopag und die Epheten. Berlin. 1874.
- Phillipson (Coleman).** The international law and custom of ancient Greece and Rome. London. 1911.
- Philochoros.** *In* Fragm. Hist. Graec.
- Plato.** Dialogues. Burnet. Script. Class. Bibl. Oxon.
- Plutarch.** Parallel Lives. Sintenis. Teubner.
- Pöhlmann (R. von).** Geschichte der sozialen Frage und des Sozialismus in der antiken Welt. München. 1912.
- Poland (F.).** Geschichte des griechischen Vereinswesens, *in* Preisschriften . . . von der . . . Jablonowski'schen Gesellschaft, XXXVIII. Leipzig. 1909.
- Pollux (Julius).** Onomasticon. Bekker. Berlin. 1846.
- Polybios.** Histories. Büttner-Dindorf. Teubner.
- Preisschriften . . . von der fürstlich Jablonowski'schen Gesellschaft zu Leipzig. *See* Poland and Ziebarth.
- Prinz (H.).** Funde aus Naukratis, *in* Beiträge zur alten Geschichte (Klio), 7tes Beiheft. Leipzig. 1908.
- Proceedings of the Classical Association. *See* Calhoun.
- Rabel (E.).** Δίκη ἐξούλης, *in* Z. SS., Roman. Abth., XXXVI, p. 340 (1915), and XXXVIII, p. 296 (1917).
- Real-Encyclopädie. *See* Pauly.
- Recueil des inscriptions juridiques grecques. *See* Dareste.
- Reinach (Th.).** *In* Dar. et S., s. v. *enoikiou dike*.
- Revue des études grecques. *See* Cloché, Dareste, Gernet.
- Riccobono (S.).** Stipulatio ed instrumentum, etc. *In* Z. SS., Roman. Abth., XXXV, p. 214 (1914).
- Rikkert (H.).** System der Philosophie. 1920.
- Röhl (H.).** Inscriptiones graecae antiquissimae. Berlin. 1882.
- Rose (Valentin).** Aristoteles Pseudepigraphus. Lips. 1863.
- Salomon (M.).** Der Begriff des Naturrechts bei den Sophisten, *in* Z. SS., Roman. Abth. XXXII, p. 129 (1911).

- Schmidt (L. V.).** Ethik der alten Griechen. 1882.
- Schömann (G. F.).** *See Lipsius.*
- Schulthess.** *In Real-Encycl., s.v. γραμματεῖς.*
- Solon.** Fragm., *in Poetae Lyrici Graeci*, Bergk. Leipzig. 1866.
- Sophokles.** Plays. Ed. R. C. Jebb. Cambridge. 1883-.
- Stobaeus (Joannes).** Florilegium, ed. A. Meineke. Lips. 1855-7.
- Studien zur Geschichte und Kultur des Altertums. *See Francotte and Weber.*
- Swoboda (H.).** *See Hermann.*
- Szanto (E.).** Das griechische Bürgerrecht. Freiburg. 1892.
- Anleihen griechischer Staaten, *in Wiener Studien*, VII. Zeitschrift für die österreichischen Gymnasien. Wien. 1885.
- Hypothek und Scheinkauf im griechischen Rechte, *in Wiener Studien*, IX.
- *In Real-Encycl., s.v. ἐκεχειρία.*
- Thalheim (Th.).** *In Real-Encycl., s.v. ἀτιμία and βλάβης δίκη.* *See also Hermann.*
- Theophrastos** *apud Stobaeum*, q. v.
- Thonissen (J. J.).** Le droit pénal de la République Athénienne. Bruxelles. 1875.
- Thukydides.** Histories. Stuart Jones. Script. Cl. Bibl. Oxon.
- Thumser (V.).** *See Hermann.*
- Tod (M. N.).** International Arbitration amongst the Greeks. Oxford. 1913.
- Toepffer (J.).** Attische Genealogie. Berlin. 1889.
- Vinogradoff (P.).** Outlines of Historical Jurisprudence, I. Oxford. 1920.
- The legal background of Demosthenes' speech in *Zenothemis v. Demon*. Offprint from the *Revue d'histoire du droit*. Haarlem. 1921.
- Weber (H.).** Attisches Prozessrecht in den attischen Seebundstaaten. Studien zur Geschichte und Kultur des Altertums, I, 5. Paderborn. 1908.
- Weil (H.).** Les plaidoyers politiques de Démosthène. Paris. 1883.

- Weiss (E.).** Recitatio und Responsum, etc., *in* Z. SS., Roman. Abth. XXXIII, p. 215 (1912).
- Wheeler (J. R.).** Some inscriptions from the Argive Heraeum, *in* American Journal of Archaeology, First Series, IX, p. 351. Baltimore. 1894.
- Wide (S.).** Griechische und römische Religion. *In* Gercke und Norden, Einleitung, Bd. 2. Leipzig. 1910.
- Wiener Studien. *See* Szanto.
- Wilamowitz-Moellendorff (U. von).** Aristoteles und Athen. Berlin. 1893.
-
- Zum ältesten Strafrecht der Kulturvölker. Leipzig. 1905.
-
- In* Kultur der Gegenwart, II. P. Hinneberg. Berlin. 1909.
- Wundt, M.** Geschichte der griechischen Ethik, I. Leipzig. 1908.
- Wyse, W.** The Speeches of Isaeus. Cambridge. 1904.
- Xenophon.** Hellenika *and* Memorabilia. Marchant. Script. Cl. Bibl. Oxon.
-
- Republica Atheniensium. Teubner.
- Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abtheilung. Weimar. 1880-. *See* Lipsius, Mitteis, Rabel, Riccobono, Salomon, Weiss.
- Zeller (E.).** Outlines of the history of Greek Philosophy, translated by S. F. Alleyne and E. Abbott. London. 1901.
-
- Socrates and the Socratic Schools, translated by O. J. Reichel. London. 1868.
- Ziebarth (E.).** Das griechische Vereinswesen, *in* Preisschriften . . . von der . . . Jablonowski'schen Gesellschaft, XXXIV. Leipzig. 1896.
- Zimmern (A. E.).** The Greek Commonwealth. Oxford. 1911.

INDEX TO VOLUME II

- Absolute property, 198.
 abuse, 176, 193 f.
 acceptance of bribes, 168.
 access to offices, 140.
 accessories, 184.
 accident
 damage by, 195.
 death by, 182 f.
 definition of, 182 f.
 accomplices, 184.
 of Kylon, 181.
 accusation, right of, 149, 152.
 accusation, political, right of, 116.
 "accusation for illegality", 137.
 See also γραφή παρανόμων.
 accusation in writing, 165.
 accusations against officials, 176 f.
 accountants, Athenian, 82 f.
 accounts of guardians, 214.
 Achilles, shield of, 89.
 visit of Priamos to, 163.
 acquisition *jure Quiritium*, 213.
 acquisition of land by foreigners, 200 f.
 acquisitive prescription in Roman law, 213 f.
 unknown in Greek law, 216.
 act of the gods, death as, 183.
actio judicati, 226.
 action at law, elements of, 116.
 action of disseisin, 224.
 action, line of, determined, 146.
 — *communi dividundo*, 51.
 in vindication, 220.
 actionable sale, 263; terms of abuse, 194.
 actions, choice of, 166 f.
 kinds of, 191 ff.
 time limit for, 161, 214.
 See also δίκαι and γραφαί.
ἀδεια, 113, 131.
ἀδικίον γραφή, 168.
 Admetos, hearth of, 101, 163 n¹.
 administration, control of, 140 ff.
 administration of justice, reciprocity in, 4.
 adoption, 6, 212, 219 f.
 Adrastos, cult of, 97.
 adultery, 47, 174 f.
 of Ares, 234 f.
 advantage, claims to, 48, 56.
 distribution of, 140.
 advocates, 133. *See also συνήγοροι.*
ἀειφυγία, 180.
affatomia, 232.
affectus socialis, 33.
 Agariste, wedding of, 236.
ἄγειν, 154.
ager publicus, 254.
 Agis III of Sparta, 9.
 agnates and marriage of heiress, 209, 220.
 agnatic clans, federations of, 6.
 agnatic organization, 178.
 agnatic relationship, 91.
ἀγῶνες ἀτίμητοι and *τιμητοί*, 49, 191.
ἀγορά of corporation, 125.
 Agoratos, speech against, 186; sureties of, 249.
ἄγος, 162, 185.
ἀγραφίου γραφή, 168.
ἄγραφος νόμος, 41 n⁶.
 agreement for distress, 219.
 agreement, international, 155.
 agreements, business, 80 f.
 agreements for immoral purposes, 238.
 agreements, international, sanctions in, 161.
 agricultural implements, 200.
αἰδεῖσθαι, 33.
αἰδώς and *δίκη*, 33, 37.
 Aigina, 5.

- Aiginetic speech of Isokrates, 4f.
 Aigospotamoi, 111.
αϊκίας δίκη, 62, 174.
 Aioliens, 208.
αϊώνιον, applied to corporations, 124.
 Aischines, family of, 178.
 professional training of, 83.
 speeches of, on *γραφὴ παρανόμων*, 138.
 on fortune of Timarchos, 199, 201.
 on loss of political rights, 190.
 on morality of orators, 172.
 Aischylos, on homicide, 185; on matriarchal and patriarchal ideas, 22 f.
 Aixone, deme of, 257 n², 258.
ἀκουσία συναλλάγματα, 46 f., 230.
 Alexander of Makedon, legislative reform of, 135 f.
 restoration of exiles by, 86.
 Alexandria, municipal law of, 5.
 Alexandros, loan of, to Arkesine, 81.
 alienation, prohibition of, in lease, 258.
 of land in Sparta, 8.
 by sale or foreclosure, 253.
 aliens at Athens, 93 f.
 Alkibiades, discussion of law by, in *Memorabilia*, 31.
 mutilation of Hermae by, 99.
 allegiance of colony, 158.
 allies of Athens, position of, in League, 159.
ἀλογίον γραφή, 168.
 allotments of land, 52, 202, 216.
 Amasis, king of Egypt, "philhellene", 3, 4.
 ambassadors, debt of, to treasury, 139.
 amendment, power of, 132.
 amendment of archaic law, 68.
 Amorgos, 81, 108, 243.
 Amphiktyonic league, 163.
 Amphipolis, citizens of, and cult of Brasidas, 58.
- ἀμφισβητεῖν*, 221.
ἀμφισβητήσεις, 58.
 Amynos, corporation of, 122, 126.
ἀναγραφεὺς, 82.
ἀναισχυντία, 33.
ἀνάκρισις, 50, 145 f., 179.
ἀναπογράφου μετάλλου γραφή, 168.
 Anaxagoras, condemnation of, 100; school of, 27.
 Anaxikles, 261.
 ancestral cults, 6, 206 f.
 ancestral customs, justice in accordance with, 157.
 ancestral property, 199, 201 f.
 ancestors, cult of, 206 f.
ἀγχιστεία, 90 ff., 211.
ἀγχιστεῖς, 178.
 Andokides, speeches of, on *ἀτιμία*, 189; on case of Leogoras, 84; on law of high treason, 170; on *νόμοι*, 72 f.; on sureties, 249.
ἀνδράποδα μισθοφοροῦντα, 199.
ἄνδρες (thirty), 85.
ἀνδροληψία, 155.
Ἀνδρομάχη of Euripides, 6.
ἀνδροφόνοι, 180, 188.
ἀνδροφόνος as actionable term, 194.
 Androtion, accusation of, by Demosthenes, 172.
 illegal proposal of, 142.
ἀνεψιότης, 92.
 animal, damage caused by, 194 f.
 death caused by, 185.
 animals and criminals, 188.
ἀντίδοσις, 55.
Ἀντιγόνη of Sophokles, 25.
 Antigonos, King, decree of, 5, 136.
ἀντιγραφεὺς, 82.
ἀντιπεπονθός, τὸ, 45, 69 f.
 Antiphon the Sophist, on Justice, 29 f., 41 f.
 Antiphon, speeches of,
 on boy killed by spear, 183.

- Antiphon, speeches of,
 on murder of Herodes, 187.
 on poisoning cases, 182, 184.
 on procedure in murder trial,
 179.
 on wounding to kill, 182.
ἀπαγωγή, 147, 186, 190.
ἀπάτης τοῦ δήμου γραφή, 171.
 Apaturia, 89, 97.
 Apaturos, case of, 219, 244,
 249 f.
 Apellis, scribe, 83.
ἀφαιρέσεως εἰς ἐλευθερίαν δίκη, 193.
ἀφανῆς οὐσία, 202.
 Aphobos, case of, 200.
 aphrodisiac, poison as, 182.
 Aphrodite, Homeric story of,
 234; at Naukratis, 4.
ἀποικία, 202.
ἀποδέκται, 134.
 Apollo, cult of, in Greek cities,
 100.
 at Naukratis, 4.
 shrine of, at Athens, 185.
Apology of Plato, 38.
 appeal by *ἔφεσις*, 77, 147.
 appeals to Council of League,
 159.
 "appeals to justice", 65.
 application of law of different
 States, 157.
 appropriation, 212 ff., 228.
 of land for burial grounds,
 206 f.
 arbitrary seizure, 227.
 arbitration, international, 50,
 145, 160 f.
 arbitrator, 146 f.
 and judge, 49 f.
ἀρχαί (= magistrates), 128.
ἀρχαῖαι μοῖραι of Sparta, 203.
 archaic formalism in Greek law,
 233 f.
 archaic forms of criminal pro-
 cedure, 177.
 archaic law, amendment and in-
 terpretation of, 68.
 archaic laws of property, 206.
ἀρχή, 53.
 Archelaos, doctrines of, 27.
ἀρχεραμισταί, 124.
 Archidamos, on slavery and law
 of nature, 28.
 Archinos, 62.
 Archon, admission of mother's
 claim by, 80.
ἀνάκρισις of, 145 f.
 as *αὐτοκράτωρ*, 77.
ἄρχων βασιλεύς, 100, 181.
 Archon Eponymos, 203, 212.
 Archons, Lysias on power of,
 114.
 the six minor, 129.
 Archonship, *δοκιμασία* for, 95.
Ἀρειοπαγεῖτικός of Isokrates, 17,
 56.
 Areiopagos, abolition of rights
 of, 130.
 discretionary power of, 115.
 and Ephetae Courts, 185.
 and guardianship of law, 137.
 jurisdiction of, 47, 75, 167,
 178 ff., 180 ff., 184.
 Ares, Homeric story of, 234, 248.
ἀργίας γραφή, 173.
 Arginusae, reward for service
 at, 95.
 trial of commanders at, 62,
 133, 151, 176.
 Argive inscription, 209.
 Argos, 96, 157, 209.
 Aristarchos, succession of, 215.
ἀριστίνδην αἰρεθέντες, 178, 181.
 Aristogeiton, speech against, 18,
 170.
 Aristokrates, speech against,
 138, 170, 177, 180 ff., 186.
 Ariston, 166.
 Aristophanes, caricature of dema-
 gogue by, 172; of litiga-
 tion by, 77.
 Aristophon, accusations of, by
γραφὴ παρανόμων, 138.
 Aristotle, classification of demo-
 cracies, 74; of justice, 44 ff.
 definition of citizen and State,
 103; definition of justice,
 19; of happiness, 14.

- Aristotle, Encyclopaedia of, 41, 43.
 terminology of, 43 ff., 152.
 works of, 43 n.
 treatment of contract and delict by, 46 f.
 on action for assault and detention, 62.
 appropriation as natural source of property, 213.
 Archinos, 62.
 associations, 119 f.
 barbaric roots of slavery, 164.
 compensation, 47.
 conventions, 230 f.
 correspondence of duties to rights, 52.
 delimitation of negligence and accident, 183.
 distribution of advantages, 140.
δοκιμασία for archonship, 95.
 education of citizen, 16.
 elements of the State, 13.
ἐπιχειρονομία, 141.
ἐπιείκεια, 64 ff.
 equality in number and proportion, 56.
ἐρανικὰ δίκαια, 125.
 exchange, 69 f.
 functions of King Archon, 181.
γραμματεῖς, 82.
 guardianship of law, 137.
 Heliastic procedure, 147.
 Hippodamos of Miletos, 49.
 individual and State, 102 f.
 juridical life of city, 105.
 juridical nature of State, 97 f.
 Kleisthenes' reforms, 9.
 legislation of Oxylos, 253; by decree, 130 f.; in democracies and oligarchies, 8.
 limits of city, 13.
 Lysimachos, 63.
 market supervision, 264.
 measures to regulate property, 16.
νόμος ἀγραφος, 41.
νόμος καθόλου, 129 f.
 — *κοινός*, 41.
 — and *ψήφισμα*, 74.
 numbers of jury, 143 f.
 origin of cities, 2.
 principle of distribution, 55.
 procedure for homicide, 177.
 retaliation, 69 f.
 social constitution of Athens, 85.
 land law, 52, 212.
 Spartan conception of citizenship, 17.
 Spartan institutions, 8.
 standard of distribution, 53, 56.
 standard of utility, 34.
 treatment of wills, 67.
 arithmetical proportion in corrective justice, 47.
 arithmetical scheme of society, 85 f.
ἀριθμῶ, 56.
 Arkadians, agreement of, with Teians.
 Arkesine in Amorgos, inscriptions of, 231; loan to, 81, 108, 243, 246 f.; treaty of, with Naxos, 247.
ἄρρηκτος (ἀγρός), 217.
 arrest of thief, 186; of debtors, 245 f.
 arson, 75, 167, 181 f.
 Artaxerxes Memnon, 204.
 Artemis, 4, 97.
 Artemis, women's worship of, 124.
ἀσέβεια, 99 f.
ἀσεβείας γραφή, 173.
 Asia Minor, Greek cities of, 136, 204; inscriptions of, 5.
 assault, action for, 47, 166, 192.
 assemblies of phratries and demes, 124.
 Assembly, administrative cases in, 168.
 attendance at, 139.
 decision of, in *εἰσαγγελία*, 169.
 decrees of, 130 f.

- Assembly, denunciation in, 150 f.
 procedure in, 132 f.
 Assembly, special, of 6,000, 131,
 139.
 assertion of private power over
 things, 212 ff.
 of property rights by *δίκη*
 ούσίας, 223.
 assessment of damage, 49.
 assessors, 156, 178.
 associations, organization of, 124.
ἀσπταρείας γραφή, 62, 169.
ἀσυλία, 156.
 asylum, 163.
 Athene Polias as mistress of
 Athens, 97.
 property of, 112, 205, 218.
 Athenian Constitution, Aris-
 totle's treatise on, 51, 53,
 59, 62, 82, 95, 137, 141,
 177, 254, 264.
 Courts, practice of, 4, 216.
 Courts and subjective element
 in pleading, 65 f.
 democracy, restoration of, un-
 der Demetrios, 137.
 Demos, attitude of, as regards
 officials, 140 f.
 fleet at Samos, 107.
 jurisdiction, methods and
 principles of, 159.
 jurors, 144.
 law and property of foreigners,
 201.
 law as regards *ὑβρις* and *μοι-
 χία*, 75.
 League, juridical importance
 of, 4, 77, 111, 158 f.
 State, continuity of, 104.
 Athenians, confusion of laws
 and decrees by, 131.
 humanity and fairness of, 65.
 religious doctrine of, 99.
 Athenogenes, case of, 68, 244,
 263.
 Athens, centre of international
 intercourse, 153.
 contrasted with Rome as re-
 gards property, 197 f.
 democratic methods at, 191.
 house of Athene at, 97.
 influence of, on Greek law,
 254.
 the *κλήρος* at, 52.
 land law at, 210.
 legislation at, 129 f.
 privileges of citizens at, 53 f.
 supervision of markets at,
 264.
 and Chalkis, treaty between,
 107; and Eretria, treaty
 between, 107; and Phase-
 lis, treaty between, 157;
 and Selymbria, treaty be-
 tween, 107.
ἀτίμητοι ἀγῶνες, 49, 191.
ἀτιμία, for abuse of magistrates,
 194.
 of Andokides, 72 f.
 breaches of, 148.
 of debtors, 205.
 as penalty for crime, 174,
 188 ff.
 of phratry, 88.
ἄτιμοι, arrest of, 187.
 Attainder, Bill of, 62.
 Attika, economic condition of,
 210 f., 245, 252 ff.
 inscription of phratry from,
 89.
 attribution of cases to Courts,
 178 f.; of land, 202 f.
 atrocities, 163.
 auction of confiscated goods, 210.
auctor of ownership, 198, 261.
 audit, 168.
 auditors of expenditure by magis-
 trates, 141.
 authorized private action, 246.
αὐτοκράτωρ, 77, 140.
αὐτομαχεῖν, 258.
ἄξονες of Solon, 5, 120.
 Babylon, 2.
 Bacchiadae, 101.
 bail after *ἐνδειξις*, 187; *bail à*
 chaptel, 259.
 bailee and bailor, 257.

- bailiffs, non-employment of, in Greece, 220.
 banishment, 191, 209.
 banker, Alexandros, 81.
 Pasion, error of, 194.
 bankers, loans to cities by, 81, 108 f.
 barbarian and Hellenic civilization, 6, 164.
 barren land, 217 f.
βασιλεῖς on shield of Achilles, 90.
 bath-house, possession of, 227.
 theft in, 176, 196.
 battery, assault and, 192.
 beam as cause of death, 185.
 Beauchet on origin of property, 206; on *ἐξούλης δίκη*, 226; on hypothecary securities, 252 n⁵; on *οὐσίας δίκη*, 225 n.
βεβαίωσις, 216 n².
 bees, domestication of, 213.
 Bendis at Athens, 126.
 Bentham, aim of political union, 34, 113.
 bequest, Solonian conditions of, 212.
 bequests, 80.
 betrothal, in Greek custom, 235.
 better right, 198, 221.
βία and *νόμος*, 31, 129 n.
βίαια συναλλάγματα, 47.
βιαιών δίκη, 61 f., 192 f.
 Bill of Attainder, 62.
βλάβης δίκη, 182, 194 ff.
 Blackstone on public and private wrongs, 165.
 Blass on inscription at Olympia, 83.
 bloodshed, pollution of, 185.
 blows, 174, 176.
 death from, 182 f.
 Boiotia, confederation of, 159 f.
 Boiotian League, 118.
 Boiotians, Four Councils of the, 119.
 Boiotos, case of, 195.
 Bokchoris, 245.
 "bootless" death, 182.
 boots and houses, equation of, 70.
 Bosphoros, 153.
βουλή, action of, in *προβολή*, 150.
 function of, 115, *and see* Council.
βουλῆς, γραμματεὺς τῆς, 82.
βουλευόμενον, τὸ, 128.
βουλευσεως, trial, 185.
 Brahmanic marriage, 233.
 Brandileone on conventions, 241 ff.
 Brasidas, cult of, at Amphipolis, 58.
 Brea, colony of, decree concerning, 52, 118, 189, 202.
 breach of *ἀτιμία*, 148.
 breach of contract, 46.
 prosecution for, 79.
 bribes, acceptance of, 168.
 bride and bridegroom, 236.
 British Museum, inscription in, 155.
 burial grounds of family, 206.
 Buselos, *οἶκος* of, 91 f.
 business agreements, 80 f.; intercourse, instruments in, 239 ff.
 business practice as basis of law, 80.
 business rules in Athenian law, 75.
 Byzgae, rules of, 163.
 by-laws of corporations, 125.
 Caecilius quoted by Harpokration, 225-6.
 Caillemer on *διαδικασία*, 221.
 captivity, leading into, 154.
 Caracalla, constitution, 241.
 Carthaginians, custom of, in *Minos*, 21.
 cattle as property, 200; for partition, 208 f.
causa of obligation, 243 f., 257.
 cause, in convention, 237.
cautio, 243.
 ceremonial acts in law, 232 f.
 Chaladria, grant of citizenship by, 117.

- Chaleion, agreement of, with Oiantheia, 155 f.
- Chalkis, lots formed at, 203.
treaty between Athens and, 107.
- change in law by enlargement of application, 80.
- Charidemos, proposed honours to, 138.
- Charondas, land law of, 255; on sale, 231, 263.
- chartered companies, 103.
- chattels, appropriation of, 213.
attribution of, 209.
disseisin of, 193.
and land, 199 f.; as security, 250.
- χειρόγραφον, 238.
- Chios, inscription of, 87.
restoration of democracy at, 136.
- chirographa, 240.
- choice of actions, 166 f., 192.
- Choragos, Demosthenes as, 61 f., 150, 166.
in poisoning case, 184.
- chorus, training of, 222.
- Cicero, use of τὸ δίκαιον by, 19.
- circumstantial evidence, 239; Isaios on, 66.
- citizen, Aristotelian definition of, 103.
- "citizen of the world", Hippias and Demokritos, 28.
- citizens, protection of, at Athens, 63.
representation of city by, 107 f., 109.
religious duties of, 98 f.
rights of, and public safety, 187.
- citizenship, basis of, 91.
grants of, 86, 131.
incomplete forms of, 95 f.
legal conditions of, 94, 117 f.
privileges of, 53, 116 f.
- city, corporate life of, 106.
limit of, 2.
obligation of, in loans, 108 f.
city, part of, in conviction for homicide, 180.
personification of, 101.
plenipotentaries of, 257.
property of, 108 f.
representation of, for treaties and loans, 107 ff.
religion of, 96 ff.; treatment of debtors by, 245.
- City Commonwealth, 2, 3.
- City-State, 5 f.
- civic justice, 44; public symbolization of, 237.
rights, loss of, 187 ff.
- civil actions, 191 ff.
- civilization, Hellenic, 164.
civitas sine suffragio, 95.
- claims to kinship, 59.
- claim of liberty for slave, 193.
- claims, enforcement of, against members of another State, 154.
against the city, 110.
settled by διαδικασία, 222.
- classification of civil actions, 191 f.
of kinds of justice, 45.
of offences, 173 ff.
of State functions, 128.
of wrongs, 165 f.
- clerks, 82 f.
- "club" (ἔρανος), 122.
- code civil*, 200.
- Code of Gortyn, *see* Gortyn.
- Code Napoléon, 64, 213.
- Codex* of Justinian, 243 f.
- colleges, formation of, 126; of magistrates, 140.
- colonia partiaria*, 259.
- colonies, foundation of, 52, 202.
- colonization, and common law of Greece, 158.
- colony, allegiance of, 158.
- combination of judicial and deliberative functions, 143 f.
— combines, 119 ff.
in Hellenistic period, 127 f.
- comitia*, 237.

- commanders at Arginusae, 62.
 trial of, 133, 151, 176.
- commanders representing city,
 107.
- commandments of Buzygae, 63.
- commercial cases, 4, 122, 161;
 credit, 263 f.; debts, im-
 prisonment for, 245.
 laws, 158.
 relations, 154.
- common burial grounds, 120.
- Common Law, 72, 78.
 of Greece, 3, 11, 158.
 of U.S.A., 78.
- Common lawyers, 237.
- common meals, 120.
 of Dorians, 8.
- community of legal principles,
 5, 158.
 of race, 96.
- companies for profit, 119.
- comparative proximity of rela-
 tionship, 220.
 — right, 221.
- comparison of ancient Greek
 with modern jurisprudence,
 265.
- compensation, 154, 161, 165 f.,
 174, 191 ff., 195 f., 236, 258.
 Aristotle's treatment of, 47 f.
- competence of courts, how de-
 termined, 178.
- composition, payment of, 188.
- compromise, 90, 177, 179.
- compulsory sanctions, 163.
- concealed property, 202.
- concession of property by city,
 198.
- conclusion of sale, 262 ff.
- conditional rights of property,
 197.
- confarreatio*, 237.
- confederation of Boiotia, 159 f.
- confirmation of legislative re-
 form, 135.
- confiscated property, claims to
 part of, 222.
- confiscation, 174, 189, 191,
 204 f., 209.
- confiscation for debt to city, 110.
 and land tenure, 203.
- conflict of ideas in *Supplices* of
 Aischylos, 22.
- "conflict of laws", rules of, 157,
 159, 161.
- conscience, 33.
- consent in agreements, 233 f.,
 257.
- conservation of laws, 136.
- consideration, doctrine of, 237 f.
- considerations of justice, 68.
- consolidated funds of city, 110.
- conspiracy, 184 f.
- constitution giving identity to
 State, 98. *See πολιτεία.*
 of judicature, 143 f.
- constitutional contrasts between
 Greek cities, 8.
- constitutional law, principles of,
 128 f.
- constitutions of dower, 261;
 registration of, 237.
- continuity of Greek custom
 under Roman law, 255.
- continuity, moral and legal, of
 the State, 104.
- contract, 192.
 breach of, 46.
- consensual, 234, 257.
 of lease and hire, 256.
 of service, 46.
 in writing, 81.
- contracts, fairness in dealing
 with them, 66, 68 f.
 law of, in the Imperial period,
 241.
- contractual obligation, interpre-
 tation of terms, 46.
- contractus, forum*, 157.
lex, 160.
- contrast between Greek and Ro-
 man property law, 197 f.
 between land and chattels,
 199 f.
- contributory negligence, 183.
- control of administration, 140 ff.
- controversies as to rights, 58 f.,
 220 ff.

- contumelious aggression, action for, 47 f., 166, 174.
- convention of Hephaistos, 234; of Orchomenos, 242 f.
- conventions, 230 ff.; interpretation of, 157.
- conveyances of public and temple property, 256.
- corn, deficiency of, in Attika, 153.
law limiting purchase of, 114.
- corn freight, loan on, 78.
mortgage of, 222.
- corndeaders, speech of Lysias against, 114.
- corporal punishment, 191.
- corporation, State as, 98.
- corporations, 121 ff.
authorization of, by State, 119.
by-laws of, 125.
continuous existence of, 122.
of public law, 103.
religious, 122 f.
- corporative bodies, development of, in Greece, 122.
- corrective justice, 45 ff.
- corruption of judges, 168.
- Council of Five Hundred, administrative supervision of, 142.
jurisdiction of, 168.
in *εἰσαγγελία*, 169.
oath of, 115.
powers of, 62 f.
προβούλευμα of, 132.
representation of city by, 107.
and Archinos, 115.
and Lysimachos, 114.
- Council of Second Athenian League, 159.
- counter-accusation for false imprisonment, 175.
- counter-action in distress, 156, 246 f.
- Court, Federal, of Boiotia, 160.
- Court of justice, theft in, 196.
- Courts, Athenian, discretionary power of, 69.
- Courts, Athenian, importance of, owing to League, 77.
- Courts, municipal, for inter-municipal justice, 161.
- Courts of corporations, 125.
- cousinship in *οἶκος* of Buselos, 92.
- cowardice, 172.
- cowards, actions against, 169.
- credit, 263 f.; — agreements, 231.
- creditor, execution by, 219, 246 f.
- crime, elements of, 182 ff.
- crime and tort, 165 ff.
- criminal intention, 182 ff.
justice, 58.
law, treatment of, by Blackstone, 165.
law, aim of, according to Protagoras, 35.
procedure, archaic forms of, 177.
- criminals, destruction of, 188.
- crown, offer of, to Council, 142.
- Crown*, speech on, 138.
- cult of ancestors and early land law, 206 f.
- cultivation as source of land tenure, 212, 216 ff.
- cultural aspect of Hellenic civilization, 164.
- cults as centres of political groups, 97 f.
societies (corporations) for, 122.
- Cumae, 254.
- custom of Greeks, legal, 233; and Roman law of mortgage, 255; custom and law, 73.
- customary law at Athens, 75 ff.
declaration of, 129.
- customs, generalization and unification of, 158.
spread of, to colonies, 158.
variety of, 20; Celtic, German and Slavonic, 232.
shipping and trade, 82, 161.

- Damage, material, 48 f., 192, 194.
 moral, 48 f., 192.
 damages, 175, 191, 225.
 Dareios, King of Persia, 20.
 Dareste on ἀμφισβητεῖν, 221 n¹.
 δατητῶν αἰρεσις, 51.
 daughters, inheritance of, 208,
 220.
de cuius, 214 f.
 death caused by animal or in-
 animate object, 185.
 by fraud, 47.
 death penalty, 151, 188.
 debt, actions of, 214; execution
 for, 245 ff.
 in Attika, 210 ff.
 debtor as juror, 188.
 procedure against, by ἐμβά-
 τευσις, 219.
 property of, claimed, 225.
 debtors, seizure of, 245.
 of the State, 139; *and see* pub-
 lic debtors.
 debts, cancellation of, 204 f.
 decision a function of the People,
 143.
 decision of arbitrators, agree-
 ment to abide by, 249.
 of court, effect on trade, 79.
 decree, legislation by, 130 f.
 decrees, significant form of, 143.
 and laws, 73 f.
 defamation, 174.
 defamatory disfranchisement,
 72 f.
 defaulters, 225.
 "defence of the realm", 148.
 defendant, status of, in conflict
 of laws, 157.
 δειλία, 235.
 δειλιάς γραφή, 169.
 Deinarchos, lost speeches of, 222,
 225.
 δεκασμού γραφή, 168.
 Dekeleia, house of, 89, 178.
 delation, 148.
 delay in bringing action, 214 f.
 delegation of executive power,
 143.
 deliberation a function of the
 People, 143.
 deliberative aspect of power, 128.
 functions of the People, 128 ff.
 delicts, Aristotle's treatment of,
 46.
 — of officials, 168; of ship-
 pers, &c., 161.
 delictual obligations, sureties in,
 249.
 delivery, payment on, 231.
 Delos, hypothecary mortgage at,
 254.
 temple accounts, 206 n³.
 Delphi, Amphiktyonic League
 of, 163.
 inscriptions at, 87, 156, 254,
 262.
 oracle of, 75, 154.
 Delphinion, 178 f., 181.
 demagogues, 172.
 demarchs, 124, 248.
 demes, 120 f., 124; representa-
 tion of, 257.
 and citizenship, 94.
 Demeter, 97.
 Demetrios of Phaleron, 137.
 δημιουργός, 88.
 demiurgi, 156.
 democracy, restoration of, in
 Chios, 136.
 degenerate, 130.
 and liberty, 16.
 democratic tribunals, 143 f.
 Demodokos, story of, 234 ff., 248.
 Demokritos on destruction of
 criminals, 188.
 on natural justice and reason,
 40.
 on φύσις and νόμος, 26 f.
 use of αἰδεῖσθαι by, 33.
 Demon, case of, 146.
 Demophantes, decree of, 170.
 δημόπρατα, 205.
 δῆμος (= the State), 105.
 Demos, action of, in καταχειρο-
 τονία, 149.
 and debts left by the Thirty,
 106.

- Demos in Athenian juridical system, 69.
 as tyrant, 74.
- δημόσιοι, public slaves, 83, 126.
- Demosthenes, fiscal policy of, 111 f.
 accusation of Meidias, 61 f., 149 f., 166, 174.
 charges of, against Androtion, 142, 172.
 speeches of, on ἀντίδοσις, 55.
 on assessment in case of Evander and Menippos, 50.
 on betrothal, 236.
 on choice of action in case of Konon, 166, 176.
 on claim to a name, 222.
 on commercial law, 4, 82, 158.
 on damage, 194 f.
 on death by accident, 182.
 definition of law, 18.
 on delay in bringing claim, 214 f.
 on διαδικασία, 221.
 on διαψήφισις, 94.
 on δίκη ἐξούλης, 61.
 on distinction between law and decree, 131.
 on duties of King Archon, 181.
 on ἐνοικίου δίκη, 224.
 on estate held in mortgage, 200.
 on ἐξαγωγή, 227.
 on execution for debt, 76, 247.
 on γραφή παρανόμων, 138, 170.
 on inheritance, 59, 91 f., 224.
 on loan to skipper of corn-ship, 78 f.
 on νομοθεσία, 134.
 on νόμος as συνθήκη, 18, 230.
 on pardon of murderer, 186.
 on procedure in homicide, 177.
 on συνθήκαι, 244; on sureties, 249 f.
 on unprofitable legislation, 171.
- Demotionidae, 89, 178.
- denizens, 95 f.
 denunciation by, 148.
 denunciation, latitude allowed to, 148.
 — to Assembly, 150 f.
 deposit of one-tenth, 221.
 deposition of slave, agreement to abide by, 249.
 deposits in litigation, 162, 249 f.
 deprivation of goods by violence, 193.
 descent, purity of, 93 f.
 despot, ukases of, 130.
 destitute citizen, case of, 54.
 determination of tribunals, 178 f.
 development of corporations in Greece, 122.
 of Greek international law, 153.
 of State from village, 2.
 deviations from strict law in Athenian Courts, 216.
dextrarum prehensio, 233.
 διαδικασία as class of action, 58 f., 192.
 after confiscation, 205.
 for debts to city, 110.
 decree of Demotionidae on, 90.
 for inheritance, 221 f.
 of Hagnias, 80, 145.
 about a name, 195.
 δαιτηταί, 50, 146 f.
 δαιτητής, arbitration of, 145.
 dialectics and rhetoric, 37.
 διανεμητικὸν δίκαιον, 45.
 διανομή, 53.
 διαψήφισις, 55, 89, 94.
dictator rei publicae constituendae, 135.
 dictatorial legislator, 135.
 difference between free men and slaves, 192.
Digest, 18, 82.
 δίκαι and γραφαί, 165.
 δίκαι ἀπὸ συμβόλων, 157, 161.
 ἔμμηνοι, 146, 245.
 ἔμπορικάι, 161 n.
 ἔρανικάι, 122, 125, 127.
 κοινωνικάι, 122, 127.
 πρὸς τινα and κατά τινος, 191 f.
 τριακοσταῖαι, 217.

- Dikaiarchos, 88.
 δικαιοδοσία, 156.
 Dikaiogenes, succession of, 214,
 216 n¹.
 δίκαιον, 19.
 Aristotelian use of, 44 f.
 δικαιοσύνη, 18.
 definition of, 19.
 ἡ καθόλου, 57 ff.
 δικασταί, decision of, on decrees,
 135; functions of, 129, 139,
 143.
 δικασταὶ κατὰ δήμους, 77, 148 f.
 δικαστήρια, representative of
 sovereign people, 69.
 δικαστήριον, appeal to, 149.
 decision of, in case of Hagnias,
 93.
 δικάζον, τὸ, 128.
 δίκη ἀφαιρέσεως εἰς ἐλευθερίαν,
 193.
 βιαιῶν, 61 f.
 βλάβης, 182, 194 ff.
 ἐνοικίου, 223 f., 228 f.
 ἐξαιρέσεως, 193.
 ἐξούλης, 60f., 193, 220, 224 ff.,
 228 f.
 κατηγορίας, 193 f.
 κακοτεχνιῶν, 196.
 καρποῦ, 223 f., 228 f.
 κλοπῆς, 196.
 οὐσίας, 223 f., 228.
 περὶ τοῦ τὰ πατρῶα δεδωκέναι,
 201.
 ψευδοκλητείας, ψευδομαρτυριῶν,
 196.
 τραυμάτων ἐκ προνοίας, 182.
 δίκη and αἰδώς, 33, 37.
 Dio Chrysostom, 5 n².
 Dionysiac artists, union of, 127.
 Dionysios of Halikarnassos on
patria potestas, 7.
 Dionysodoros, case of, 78 f., 186.
 Dionysos, franchise of, 246.
 leases of lands of, 217 f.
 Dionysos, patron of Apaturia, 97.
 Diopieithes, decree of, concerning
 impiety, 100.
 διορθωτικὸν δίκαιον, 45 ff.
 discipline of corporation, 125.
 disfranchisement, defamatory,
 72 f.
 grounds for, 94.
 dispossession, 224.
 disputes (ἀμφισβητήσεις), 58.
 local settlement of, 149.
 between citizens of different
 states, 154 f.
 under intermunicipal agree-
 ment, 161.
 disseisin, action of, 224 ff.; judge-
 ment in, 247.
 of a chattel, 193.
 dissolution of corporations, 123.
 distinction of διαδικασία from
 δίκη or εὔθυνα, 221.
 of fixed and varying fines,
 191.
 of kinds of property, 199 ff.
 of law and decree, 129 ff.
 of murder and manslaughter,
 183.
 of principals and accomplices
 in crime, 184.
 distress, 154, 193, 219 f., 246 ff.
 distribution of honours and pro-
 perty, 51 ff.
 of lots as basis of property,
 198.
 distributive justice, 45, 47, 51 ff.
 divine origin of law and justice,
 18, 20, 41.
 division of functions in the State,
 128.
 divisions of justice, 44 f.
 divorce, 201, 208.
 documents, registration of, *see*
 registration.
 use of, in Courts, 147.
 dogs, damage by, 195.
δοκιμασία, 53.
 for archonship, 95.
 for ἀτιμία, 190.
 of Council, 142.
 of magistrates, 140 f., 168.
 domicile of defendant, 157.
dominium ex jure Quiritium,
 198.

- donation, 222.
 Dorians, common meals of, 8.
 — and Ionians, 7.
 δώρων γραφή, 168.
 δωσιδικία, 155 ff.
dos profecticia, 251.
 dowry (dower), in code of Gortyn, 201, 208; constitutions of, 237, 261; property pledged for, 219; restitution of, 251; as test of legitimacy of marriage, 80.
 double price as fine, 193.
 δόξα τῆς πόλεως, 35, 38 f., 265.
 Drakon,
 law of, on manslaughter, 76, 90, 177 ff., 180.
 possible addition to, 180; reenactment of, 181.
 and guardianship of law, 137.
 as *θεσμοθέτης*, 74, 129.
 Drakontides, accusation of Perikles by, 132.
 drama, illustrating public opinion, 22 ff.
 dream, made ground for *εισαγγελία*, 152.
 dress, as property for partition, 208.
 drugs, administering of, 184.
 dualism, in judicial procedure, 145.
 dualistic ownership, 209.
δυναστείαι, 1.
 duplication of price, 193.
 duties of citizens,
 religious, 98 f.
 to State, according to Plato, 40.
 Earnest money in sale, 262.
ἔχειν καὶ κρατεῖν, 198.
 economic condition of Attika, 210 f.
 education of citizen, 16.
 Egypt, law of debt in, 245.
 Egyptian papyri, 5, 242.
 vessel as prize of war, 139.
Εἰκαδείς, trial of members by, 125.
εἰσαγγελία, 62, 149 ff., 169 f., 171; abuse of, 152.
εἰσαγωγή, 146.
 ejectment, 225, 227.
ἐκγυή, 233 n¹.
ἐκκλησία, function of, 69, 84, 115.
 — *κυρία*, 141.
 ekklesiasts as heliasts, 139.
ἐκκλητος πόλις, 160.
ἐκτῆσθαι κυρίως, 204.
 election by lot to offices, 140.
 elements of an action at law, 116.
 of crime, 182 ff.
 of property, 197 f.
 Eleusis, 97.
 Eleusinian Mysteries, 72 f., 76.
ἐλευθερία, as basis of citizenship, 55, 57, 116.
ἐλευθερίαν, ἀφαίρεσις εἰς, see *under δίκη*.
 Eleven, the, 147, 186 f.
emancipatio, 233 n¹.
ἐμβάτευσις, 219 f., 248.
 embezzlement, 168.
 eminent control of Romans, 243.
 domain of State, 203.
ἔμμηνος δίκη, 146, 245.
ἐμφύτευσις, 217 f.
 emphyteutic leases, 259.
ἐμπορικὰ δίκαια, 161 n.
ἐμπορικὸν συμβόλαιον, 81 n.
 'en fait de meubles la possession vaut titre', 213.
ἐν δδῶ, 183.
ἐν μέρει δίκαιον, τὸ, 45.
ἐν Φρεαττοῖ, 185.
 enacted law, 72 f.
 Encyclopaedia of Aristotle, 41, 43.
ἐνδείξις, 148, 187.
ἐνέχυρον, 250, 252.
 enforcement of claims against members of foreign States, 154; of legality, 115 f.; of obligations, 245 ff.
 English law of corporations, 119.

- English law, injunction in, 195.
 judicial decisions in, 136.
 English writ of right, 221 n⁴.
ἐγγυᾶν, *ἐγγύη*, *ἐγγύης*, 234 ff.
ἐγγύησις ἐπὶ δικαίοις, 236.
ἐγγυηταί, 236 n⁴, 262.
ἐγκησις, 200.
ἐνοικίου, action, 223 f.
ἐνθύμημα, 28, 37.
 enticing of slaves, 47.
 entry (*ἐμβάτευσις*), 219 f.
ἐπ' αὐτοφώρῳ, 180, 186.
 ephebos, oath of, 99.
ἔφεσις, 77, 147.
 Ephesos, inscription on debts,
 204 f.
 Ephetae, 167, 178, 180 f., 185.
 Ephialtes as dictatorial legis-
 lator, 135.
 establishment of *νομοφύλακες*
 by, 137.
 law of, dealing with Areiopa-
 gos, 30, 167, 187.
 and range of appeal to
 Heliastic Courts, 77.
ἐπιδικασία, 215, 220 f.
ἐπίδικος, 220.
ἐπιχειροτονία of magistrates,
 141 f., 168.
 — *τῶν νόμων*, 133.
 Epicurean view of welfare, 14.
 Epicurus, 13.
ἐπιείκεια, 45, 63 ff.
 of Athenian jurors, 144.
 Isokrates on, 106.
ἐπιεικές, τὸ, in conventions, 239.
ἐπικλήρων κάκωσις, 173.
ἐπικλήρος, 93, 215, 220.
 in Solon's legislation, 211.
 Epiknemidian Lokri, 203.
ἐπίκτητα, 201.
 Epikteta, society of, 122 f.
 Epimenides of Krete, 185.
ἐπιπλα, 199 f.
ἐπιστάτης, 134, 168.
ἐπιστατικὴ γραφή, 168.
ἐπιτάγματα, 130.
 Epizephyrian Lokrians, 228.
 equality, principle of, 57.
 equation of boots and houses, 70.
 equitable remedy, 239; equit-
 able, the, 44.
 equity, 45.
 in Greek courts, 42, 144.
 in Greek jurisprudence, 63 ff.;
 in treatment of contract,
 239, 244 f.
ἔρανοι, 121 f.; *ἔρανος* loan, 121 f.,
 232.
ἐραναὶ δίκαι, 122, 125, 127.
 Eraton, debt of, 110.
 Eratosthenes, Lysias' speech on
 death of, 175.
 Erechtheus, 97.
 Eretria, treaty between Athens
 and, 107.
 Ergokles, deposit by, 250.
 Erinyes, 185.
 eristic method of Sokrates, 38,
 41.
ἐρρηγεία, 217.
 Esmein, on convention, 234 ff.
Espirit des lois of Montesquieu,
 10.
 estates, actions about, 223 f.
 estates in Attika, 203.
 "estimation" (*δοκιμασία*) of can-
 didate, 53.
 Eteobutadae, 178.
 Eteobutad, Pyrrhos the, 188.
Ethics of Aristotle, 16, 51 f.,
 57, 64, 69 f., 140.
 Eubulides, in case of *διαψήφισις*,
 94.
 and inheritance of Hagnias,
 91 f.
 Eubulos, financial policy of, 112.
εὐδαιμονία, 14.
 Eukleides, archonship of, 73, 94.
 Eumeleides, 63.
 Eumolpidae, 76.
 Eupatrid clans, 300 representa-
 tives of, 181.
 Eupatridai, 75 f.
εὐπραξία, 14.
 Euripides, on *δικαιοσύνη*, 24.
 on Greeks and barbarians, 6,
 23.

- Euripides on tyranny and law, 73.
 charge of impiety against, 100.
 Euryptolemos, action in trials of generals, 151.
εὐθυναί, 141 f.
εὐθυνοσ, 141; — of tribe, 168.
Euthyphron of Plato, 98.
 Euxenippos, speech for, 151 f., 169.
 Euxitheos, case of, 94.
 Evander the Thespian, case of, 50 f., 147.
 eviction, 227.
 evidence, law of, 72.
 treatment of, 145.
 right to give, 196.
 on oath, right to give, 189.
 before arbitrator, 147.
 "evil livers" debarred from political life, 190.
ex lege Aquilia de damno injuria dato, 194.
ex post facto legislation, prohibition of, 139.
ἐξαγωγή, 227.
ἐξαπέσεως δίκη, 193.
 examination of facts and procedural form, 151.
 exception, 146.
 based on prescription, 215 f.
 exchange, justice in, 69 f.
 of property, 55.
 execution on city for non-payment of loan, 81, 108.
 by creditor or mortgagee, 219, 245 f.
 by judgement or magistrate's order, 219 f., 261.
 by private force, 227, 247 f.
exécution parée, 81.
 execution of penalties by corporation, 125; by demarchs, 248.
 executive officials, position of, at Athens, 140 f.
 power, delegation of, 143.
 power of State, 128.
ἐξηγηταί, 75 f.
 exile for murderers, 179 f.
ἐξίλλειν, 60, 225.
ἐξούλης δίκη, 60 f., 193, 220, 224 ff.
 Beauchet on, 226.
 expiatory functions of Epimenides, 185.
 — rites for homicide, 185.
 exploitation of barren land, 217; of private property, 113.
 export, prohibition of, in Attika, 153.
 expropriation, 204 ff.
extra commercium, 206.
 extravagance, 173.
 Fair price, 70.
 fairness, 45, 63 ff.
 false evidence, 196.
 false imprisonment as an adulterer, 175.
 false witness, 47.
familia pecuniaque, 200, 209 n³.
familiae eriscundae in Roman law, 51.
 familial source of land law, 206 f.
 families and holdings, 91 f.
 family, the, impoverishment of, 94; offences against, 173 f.
 family graves, 93.
 groups and land tenure, 206.
 law and religion, 6.
 organization in city structure, 174.
 property as basis of citizenship, 91; in Attika, 211 f.
 unity, religious, 93.
 fate, idea of, in drama, 23.
 Federal Court of Boiotia, 160.
 governments in Greece, 118.
 federation, forms of, 118.
 of families, admission to, 95.
 of kindreds, 85 f., 91, 178.
 federations, 158.
 fee, claim to, of commonwealth, 193, 196.
 fictitious instruments, 242 f.; sale, 261 f.
 fiduciary sales, 255.

- fields, ownership of, 207.
 finance, machinery of, controlled by Council, 142.
 financial measure, action of νομοθέται in, 134.
 fine, claim to part of, by informer, 148.
 fines, 190 f.
 fixed or varying, 191.
 of corporations, 125.
 of phratry, 88 f.
 as sanction in international agreements, 161 f.
 in case of defeat in γραφή, 174, 176.
 for failure to pay debt, 109 f.
 for rape, 193.
 for theft, 196.
 First Archon, duties and functions of, 51, 60, 77, 173.
 First Athenian League, 4, 111, 158 f.
 fiscal policy of Athens, 110 f.
fiscus, 109.
 fishing, 213.
Φισοδαμιοργός, *Φισοπρόξενος*, 117.
 five years as time limit to claim, 214.
Φοικῆς, succession of, 208 f.; tenancy of, 259.
 force as the *ultima ratio*, 28 f.
 foreclosure, 253, 261.
 foreign cults at Athens, 126.
 foreign imports, 153.
 foreigner in case of *προβολή*, 150.
 foreigners, prohibition of, to acquire land, 201.
 punishment of, 170, 191.
 formalism in law, 232 f.
 formulae in inscriptions concerning *ἀσυλία*, 156; of betrothal, 236; of oaths, 162.
 formulation of law of treason, 151.
forum contractus, 157.
forum domicilii of defendant, 157.
 Foucart on development of associations in Greece, 126.
 Four Councils of Boiotia, 119.
 Four Hundred, fall of, 90, 170.
 four-footed animals, damage by, 195.
 France, prohibition of social combinations in, 119.
 treatment of social groups in, 85.
 fraud in delicts, 47.
 free trade in land, 210 f.
 freedmen and foreigners as citizens, 117.
 freedom in choice of action, 166.
 French *code civil*, 200.
 French law, *exécution parée*, 81; seisin, 219.
 — lawyers, on *cause*, 237.
 friendly arrangements, 232.
 functions of the people, deliberative, 128 ff.
 judicial, 143 ff.
 funds for war, 111.
 Funeral Oration of Perikles, 16.
 funerals, enactment about, 88 f.
fundus, 200.
 furniture as property, 199 f.
 Fustel de Coulanges on origin of private ownership, 206 f.
 Gage, 250 f.; seizure of, 219.
 Gaius in *Digest*, law of Solon, 120.
 on use of instruments, 240 f.; on obligations, 255.
 games, national, of Greeks, 154.
 garrisons, right to keep, 159.
γή καρπούσα and *ψιλή*, 217.
γένη, 85 ff., 124, 178.
 general justice, 45.
 generalization of customs and laws, 157 f.
 generals, election of, 140.
 trial of, *see* Arginusae.
γενηῖται, 85 f.
 geometrical proportion in distributive justice, 47.
geomori, 255.
γεονόμοι, at Brea, 202.

- German law,
Gewere in, 227; hostages in,
 235; "*Kauf bricht Miete*",
 258.
- Gernet, on Homeric convention,
 234 ff.
- gift, *ξρανος* as, 232.
- Glaukon and Glaukos in Hagnias
 case, 146.
- Glaukon in *Republic*, 29.
- Glossary of Harpokration, 233 ff.
- Glotz on duplication of price in
 fines, 193 n²; on Homeric
 convention, 234 ff.
 on reference in *Politics* to
 Solon's land law, 212 n.
- Gneist, doctrine of, on conven-
 tions, 240 ff.
- γνώμη δικαιοσύνη*, 68.
- Gods, cities as households of, 97.
 justice as regards, 98.
 property of, 205 f.
- γονέων κάκωσις*, 173.
- good faith, 214; in sale, 263;
 guarantees of, 260 f.
- "good life", 2, 14.
- goods (*πάματα*), 209.
- Gorgias, sophist, contrasted with
 Sokrates, 37.
 subjectivism of, 28, 40.
- Gorgias* of Plato, 29.
- Gorgos and Minyon, grant of
 citizenship to, 86.
- Gortyn, law of,
 on heiresses, 211.
 on land, 207 f.
 on possession of a slave, 228.
 on property, 201.
 on tariff for rape, 175, 193.
 and Greek law in general, 7,
 11.
- Grace, 69.
- γραμματεῖς*, 82 f.
- granting of justice, 156 ff.
- grants of citizenship, 86, 131.
- γραφαί*, 165 ff.
ἀγραφίον, ἀλογίον, &c., &c.,
 168 f.
ἱεροσυλίας, 173.
- ὑβρεως*, 150, 174 f., 192.
κλοπής, 168, 174, 176, 196.
παρανόμων, 84, 133, 137 ff.,
 170, 189.
τοῦ μὴ ἐπιτηδείου νόμου, 171.
- graves, 93.
- Greek betrothal, 235; contracts,
 binding force of, 233; cus-
 tom, 233 f.
- Greek customs under Roman
 rule, 255.
- Greek democracies and prece-
 dents, 78 f.
 doctrine of property, summary
 of, 228.
 drama, legal conceptions in,
 22 ff.
 international law, 153 ff.;
 — games, 154.
- Greek law, unity of, 3.
 of combinations, 120; of con-
 ventions, 230 ff.; works on,
 256.
 on derivation of title, 216;
 gage in, 250.
- Greek leases, contents of, 258 f.
 — public law, 102 ff.
 — wedding, 236.
- Greeks and barbarians, 6.
- Grotius, 33.
- group psychology of city, 96.
- guarantors of city's debt, 109;
 in sale, 262.
- guardians of orphans, accounts
 of, 214; obligation of, 251.
- guardianship of laws, 136 ff.
- γυῖα*, 233.
- Guiraud on origin of land tenure,
 206.
- γυναϊκὴ πειθόμενος*, 263.
- Hagnias, estate of, 59, 80, 91 f.,
 145, 221.
οἶκος of, 91 f.
- Halia in Doric Greece, 69.
- Halikarnassos, 139; debt of,
 246; hypothecary mort-
 gage at, 254; inscription
 of, 198 n², 204, 260.

- Halimus, deme of, 94.
 hand labourer (*thes*), 210.
 handfasting, 233.
 handicraft, Greek view of, 96.
 happiness, Aristotle's definition of, 14.
 Harpokration, on *δατητῶν αἵρεσις*, 51; on *δίκη ἐνοικίου*, 224; on — *ἐξούλης*, 60, 225 ff.; on — *οὐσίας*, &c., 223 ff.; on *καταχειροτονία*, 149.
 hearth, ancestor worship at, 206.
 as asylum, 101, 163.
 establishment of, in plot, 203.
 of the city, 100.
 Hegepolis, scribe, 83.
 Hegestratos, 222.
 heiresses, marriage of, 6, 93, 209, 211 f.
 heirs, wrongs to, 77.
ἐκούσια συναλλάγματα, 46 f., 230.
ἐκτήμοροι, 259.
 Heliæa, jurisdiction of, 69, 168.
 legislation as a function of, 129.
 Heliastic commission for legislation, 134 f.
 for *προβολή*, 51.
 Heliastic courts,
ἀνάκρισις for, 50.
 appeal to, 77.
 limitation of procedure in, 147.
 precedents in, 78.
 size of, 49.
 weakness and virtue of, 11, 12.
 Heliastic decisions, influence of, on law, 79.
 heliasts in assembly, 139.
 in criminal courts, 181.
 oath of, 68, 205.
Hellenica Oxyrhynchia, 159.
Hellenika of Xenophon, 151.
 Hellenion at Naukratis, 4.
 Hellenism as badge of civilization, 164.
 Hellenistic period, associations and corporations in, 127.
 documents of, 240.
 Hellenotamiae, 112.
 Ἐνδεκα, οἱ, 147.
 Hephaistos, in Homer, 234, 238.
heptopada, 233.
 Hera, 97.
 Herakleitos on absolute good and justice, 41.
 on law, 19 ff.
 Heraklea, leases of, 217 f.
 herald, declaration by, 220.
heredes sui, 219.
 Hermae, mutilation of, 84, 99, 249.
 Hermione, 6.
 hero worship, 122 f., 207.
 Herodes, murder of, 20 f., 187.
 Herodotos, history of,
 on Naukratis, 3 f.
 on variety of custom, 20 f.
 on wedding of Agariste, 236.
 Hestia, cult of, 100.
ἔστιοπάμων, 209 n³.
 Hesychios, 208.
ἐταίρησις, 172, 189.
ιερῶν ὀργίων, 120.
ιεροσυλίας γραφή, 173.
 hierarchy of judicial authorities, 78 n.
 high treason, law of, 151 f.
 penalty for, 189.
 prosecution for, 169 f.
 Hippias of Elis, "citizen of the world", 28.
νόμος and *φύσις*, 40 f.
 Hippodamos of Miletos, 49, 144.
Hippolytos of Euripides, 100.
 historical identity of State, 104.
 — jurisprudence, task of, 10.
 Hobbes, 33.
 holdings, Plato's 5,040, 9.
 and families, 91 f., 203.
 and see *κλήροι*.
 Homer on adultery of Ares, 234 f.; on *Kyklopes*, 1.
 Homeric poems, influence of, 154.
 homicide, 47, 75, 180 f., 177 ff.
 men guilty of, 187.
 see also manslaughter and murder.
homo omnium mensura, 34.

- ὀμογάλακτες, 86.
 ὀμοίος (fellow-citizen), 17.
 ὀμολογία, 238, 242.
 ὀμόταφοι, 120.
 honorary offices, access to, 140.
 honour, loss of, *see* ἀτιμία.
 honours, distribution of, 51 f.
 hoplites as representatives of city, 107.
 ὄροι in Attika, 252 f.
 hostages, taking of, 155, 162 ;
 as sureties, 234 f., 248.
 House of Lords, 78 n¹.
 housebreaking, 177.
 household, 91 ff.
 households and κλήροι, 91 f., 203.
 of the gods, 97.
 houses, actions about, 223 f.
 and boots, equation of, 70.
 as property, 199 f.
 ὄβρις, 166, 190.
 ὄβριεως γραφή, 150, 174 f., 192.
 humane tendencies of Greek life,
 effect on law, 7.
 humanity, principles of, 162 f.
 — (φιλανθρωπία) of the Athenians, 65.
hunc fundum meum esse aīo ex jure Quiritium, 198.
 hunting, 213.
 ὑπερημερία, 251.
 ὑπερήμερος, 219.
 ὑποθήκη, 250 ff.
 husband, right of, to dowry property, 219.
 Hygiainon, charge against Euripides, 100.
 Hyllaeans, tribe of, 210.
 Hypereides, literary skill of, 12.
 lost speeches of, 222.
 speech of, on right of mutual assistance of citizens, 116.
 on contracts, 68.
 on εἰσαγγελία, 151 f., 169.
 on γραφή παρανόμων, 133 n ;
 on influence of women, 263 ;
 on συνθήκαι, 244.
hypotheca, transitional use of, 253.
 hypothecary gage, 250 ff. ; mort-gage, 252 ff. ; obligations, 219, 222.
 Iasos, law of, 203 f., 260.
 idealistic intellectualism of Sokrates, 41.
 identity of the State, 97 f., 105 f.
 illegal distress, 156.
 illegality, accusation for, *see* γραφή παρανόμων.
 action for, right of bringing, 189.
 ill-treatment of parents, &c., 173.
immeubles par destination, 200.
 immoral purposes, agreements for, 238.
 immunity, 131.
 Imperial rescripts, 243.
imperium, 113.
 impiety, *see* ἀσέβεια.
 imprisonment for debt, 245 f. ;
 on ἔνδειξις, 187.
 as legal offence, 47.
 as penalty, 190 f.
 of thief, 186.
 inalienable holdings, 203, 210.
 inanimate object, death caused by, 185.
 income from holding, 209.
 incomplete forms of citizenship, 95 f.
 inconvenience of law as ground for γραφή παρανόμων, 170 f.
 Indian custom and Greek, 21.
 individual, the, and the group, 85 f.
 and the State, 15 f., 85, 102 f.
 individualization of landed property, 57, 210.
 inequalities between classes of population, 57.
infamia, 174, 188 ff. *See also* ἀτιμία.
 infamy, infliction of, by phratry, 88.
 infringement of old law by new, 136 f.

- inheritance in law of Gortyn, 208 f.
 by mother, 80.
 speeches on, 59.
See also under Hagnias.
- initiative in legislation, 131 f.
- injunction in English law, 195.
- injustice of law as ground for *γραφὴ παρανόμων*, 170.
- inscription of tenure, 198, 256 ff.
- inscriptions of Aixone deme (leases), 257 f.
 Argive, from Heraion, 209.
 of Arkesine, 81, 108, 231.
 of Asia Minor (conventions), 242.
 Athenian, 95, 134.
 of Brea, 118, 202.
 of Chaladria, 117.
 of Chaleion, 155.
 of Chios, 136.
 of Delphi, 87 f., 156.
 of Ephesos, 204 f.
 of Halikarnassos, 198 n, 204, 260.
 of Iasos, 204, 260.
 of Kalymne, 160.
 of Kos, 136, 160, 254.
 of Lebedos, 136.
 of Magnesia, 118.
 of Mykonos, 255 n³.
 of Mylasa, 204, 218.
 of Oiantheia, 155.
 of Olymos, 218.
 of Olympia, 82 f.
 of Orchomenos, 109, 242.
 of Priene, 83.
 of Smyrna, 118.
 of Tenos, 204 n⁴, 261.
 of Teos, 136, 156.
 of Thisbe, 218.
 on citizenship, 86, 95, 117 f.
 on debt, 109, 204, 242 f., 246 f.
 on leases, 257 f.
 on manumission sales, 156, 262.
 on payment to Peisitheides, 134.
- instruments, written, 239 ff.
instrumentum fundi, 200.
- insulting behaviour, legislator's attitude towards, 175.
- intention in contract, 234, 239;
 in crime, 182 ff., 195.
- interdict, 59, 227.
- interests, protection of, 197.
- intermunicipal humanity of Greeks, 164.
 — relations, 153.
- international agreement, 155.
 — arbitration, 160 f.
 — justice, embodiment of, in League, 163.
 — law in Greece, development of, 153 ff.; root of, 162.
 — relations, 153 ff.
- interpretation of archaic law, 68.
 of conventions made at Athens and outside, 157
 of terms of contract, 46.
- interpreters of law, 75 f.
- intervention of patrons, 154.
- intestate succession, 211.
- intrusion, 224, 227.
- inundation, damage by, 195.
- Ionian cities, law of, 11.
- Ionians, 208.
- Isagoras, 97.
- Isaios, dialectics of, 12.
 lost speeches of, 222 f.
 reference to, by Harpokration, 370.
- on circumstantial evidence, 66.
- on inheritance of Hagnias, 59, 80, 91 f., 145, 221.
- on mother's claim, 80.
- on property of Kiron, 199.
- on time limit to claim of inheritance, 214 f.
- on wills, 67.
- island cities, 136.
- Isokrates,
 on associations under monarchy, 8.
 on choice of action, 176.

- Isokrates,
 - on claim to Messenian territory, 213.
 on contumely, 48.
 on ἐπιείκεια of Athenians, 106.
 on Hellenism, 164.
 on identity of law of succession, 158.
 on social ideal and equality, 17, 56
- isolation of Greek states, 20, 153.
- ἴσον, Aristotelian use of, 44.
- ἰσοπολιτεία, 117.
- ἰστία at Naupaktos, 203.
- iteration of office, 140.
- Jettison, law of, 82.
- joining of hands, 233.
- joint owners, 219.
- judex*, 145.
- judge and arbitrator, 49 f.
- judgement, execution on, 219 f.
- judges, corruption of, 168.
 local, 148.
- judge-made law, 72.
- judicature, constitution of, 143 f.
- judicial arbitration on mortgaged estates, 205.
- judicial aspect of power, 128.
 authority, 78.
 commission of νομοθέται, 134 f.
 decisions, aim of, in English law, 136.
 functions of the People, 143 ff.
 monopoly of State, 59.
- judiciary power of State, 128.
- judicio*, procedure *in*, 145, 152.
- jure*, procedure *in*, 145, 152.
- juridical basis of marriage, 236 ;
 forms, 232 f.
 nature of the State, 97 f.
 theory of property, 199 f.
- juris periti*, 76.
- jurisconsults, 145.
- jurisdiction of Athens in League, 159.
- jurisprudence, Protagoras' theory of, 32.
 Sokrates' principles of, 38.
- jurors, Athenian, judgement of, 144.
- jus*, 19.
civile, 2, 234 ; *gentium* and *honorarium*, 234.
in rem, 57.
merum, 221 n⁴.
Quiritium, 3, 232.
- justice, Aristotle's terminology and classification of, 44 ff.
 common element in, 41.
 definition of, 19.
 divine origin of, 41.
 granting of, 155 f.
 notion of, 18.
 standard of, 144 ff.
 according to Antiphon the Sophist, 29 (cf. 42).
 and ancestral custom, 157.
 as regards the gods, 98.
 in general, 57 ff.
 obtained by self-help, 155.
- justification of law, 31 ff.
- Justinian, *Codex* of, 243 f.
- κακηγορίας δίκη, 174, 193.
- κάκωσις, 173.
- κακοτεχνιῶν δίκη, 196.
- κακοῦργοι, 187, 190.
- Kallikles, case of, 195.
 in *Gorgias*, 29.
- Kallistratos, convention of, with Olympiodoros, 238.
- Kallixenos, in Arginusae trial, 151.
 fate of, 133.
- Kalymna and Kos, case of, 160.
- Kannonos, decree of, 151, 170.
- καρπῶ, 209.
- καρποῦ, action, 223.
- καρπούσα γῆ, 217.
- καρτερόν εἶναι, 198.
- κατ' ἀναλογίαν, 47.
- κατὰ τὴν ἀριθμητικὴν, 47.
- καταχειροτονία, 149.
- καταδεδωκέναι τὰ πάτρια, γραφὴ τοῦ, 173.
- κατάλυσις τοῦ δήμου, 169.
- καθόλου δίκαιον, τὸ, 45.

- καθόλου, τὰ, 129.
 "Kauf bricht Miete", 258.
 Kephallenia, order of magistrates of, 158.
 Kephalos and γραφή παρανόμων, 138.
 κέρδος, 48.
 Kerkyraians, complaint of, 160.
 Kimon, trial of, 151.
 kindreds, federation of, 85 f., 91, 178.
 kinds of property, 199 f.
 king, function of, in murder trials, 179 ff.
 king, the, residuary justice of, 69.
 king archon, function of, 100, 181.
 kinship and property, 91 f.
 kinsmen, solidarity between, 235.
 Kiron, property of, 199.
 κλᾶρος, 202 f., 208 f., 210 f.
See also κληρος.
 κλαρῶται, 208.
 Kleisthenes of Athens, extension of citizenship by, 94, 117.
 social legislation of, 9, 86.
 and cult of Dionysos, 97.
 as dictatorial legislator, 135.
 Kleisthenes of Sikyon and cult of Adrastos, 97; in wedding of Agariste, 236.
 Kleomenes, king of Sparta, 9, 97.
 Kleon, Aristophanes' caricature of, 172.
 views of, 57.
 Kleonymos, will of, 67.
 κληῖροι, number of, 86.
 κληρονομία, 203, 216.
 κληρονόμος, 203.
 κληρος, 6, 52, 61, 202 f., 210 f., 253.
 — and οἶκος, 91 f.
 κληροῦχοι, 202.
 κλοπῆς δημοσίων χρημάτων γραφή, 168.
 κλοπῆς δίκη, 176, 196.
 κλοπῆς γραφή, 174, 176, 196.
 Klytidae, 87 f.
 Knidos, trial in Court of, 160.
 knights as representatives of city, 107.
 κοινὴ of law, 5.
 κοινωνία πολιτῶν πολιτείας as principle of State personality, 105.
 κοινωνικὰ δίκαι, 127.
 Konon, Ariston v., 166, 176.
 Korinth, custom of, in colonization, 101.
 relation of, to colonies, 118.
 Korinthian war, the, 215.
 Kos and Kalymna, case of, 160.
 Kos, inscription of, 85 f., 160.
 κόσμος (= the State), 105.
 κρατοῦν, τὸ, 31.
 Kretan οἰκῆς, 208 f., 259.
 Krete, law of Doric cities, 7, 208.
 κρίνειν, 143.
 Kritias, Sophist, on νόμος and φύσις, 40.
 Kriton of Plato, 36, 239.
 Krokonidae, διαδικασία of, 225 f.
 Kronia, festival of, 99.
 κτήματα, 224.
 Ktesiphon, case of, 138.
 κυρία ἐκκλησία, 141.
 κύριος in rape, 192; of bride and dowry property, 219, 236.
 κυρίως κτῆσθαι, 198, 204.
 Kyklopes, 1.
 Kylon, 181.
 Labour, products of, 225.
 as basis of ownership, 197.
 Labyadae, 87 f.
 laesio enormis, 263.
 Laissez-faire doctrine, 13.
 Lakedaimonian rules on property, 8.
 Lakritos, speech against, 4, 82, 158, 231, 247.
 land, acquisition of, by foreigners, 200 f.

- land, appropriation of, 206 f.
 division of, 202.
 property in, 91, 199 f.
 redemption of, in Attika, 252.
 redivision of, 205.
 right of acquisition of, in League, 159.
 bearing fruit, 217.
- land holding, Athenian, 210 f.
 Doric, 208 f.
- land law, rights and remedies in, 218 ff.
 of Sparta, 8.
- land reforms of Solon, 210 ff.
- land tenure, 200 f.
 creation of, 206 f.
 early Doric, 208 ff.
 sources of, 212 ff.
- landed estate as security, 250 ;
 property, individualization of, in Attika, 210.
προθεσμία in trials as to, 214.
- Lares compitales*, 126.
- λαθραῖα συναλλάγματα*, 47.
- Laurion, silver mines of, 111.
- law as compact, 18.
 and decree, distinction between, 129 ff.
 of citizenship at Athens, 94 ;
 of contract, 256 ff.
ἐπ' ἀνδρί, 73.
 of Gortyn, *see* Gortyn; of lease and sale, 256 f.; of mortgage, 252 f.
 of nature, 40, 42.
 of persons, 57.
 of procedure, 78.
 of property, essence of, 197.
 of Solon about societies, 120.
 of succession, 206 ff. ; in Attika, 211 f.
 of things, 57.
 of Zaleukos, 228.
 divine origin of, 18, 20.
- law-giver, 74.
- laws, general revisions of, 135 f.
 guardianship of, 136 ff.
- laws, generalization and justification of, 158.
 decrees, 74.
Laws of Plato, 1, 9, 16, 33, 85, 183, 188, 195.
 — of Theophrastos, 259 ff.
 “*le mort saisit le vif*”, 219.
- League of Nations, embryonic, 163.
- leagues and confederacies, unifying action of, 158.
- lease, law of, 256 ff. ; sureties in, 249 ; varieties of, 258 f.
- leaseholders, liability of, 251, 254 n¹ ; rights conceded to, 218.
- leases of land, 217 f.
- legal basis of sovereignty, 28.
 conditions of citizenship, 117 f.
 personality, 103.
 redress, 46 ff.
- legatees in law of fourth century, 80.
- legislation at Athens, 129 ff.
 ascription of, to Heliaea, 129.
 initiative in, 131 f.
 process of, 131, 133 f.
 responsibility for, 132 f.
 by decree, 130 f.
 under oath, 99.
ex post facto, 139.
 at Ephesos, on debt, 204 f.
- legislative function of State, 128.
- legitimacy of marriage, 80, 236.
- λειτουργία*, property sufficient for, 201.
- λειτουργίαι*, 9, 55, 99.
- Lemnos, formation of lots at, 203 ; mortgage at, 254.
- Leochares, case of, 59, 221.
- Leogoras, trial of, 84.
- Leokrates, speech against, 12 n¹, 98 f., 116.
- Leptines, speech against, 131, 171.
- lessee, 224. *See also* lease.

- lex*, 19.
lex contractus, 160.
Lexica Segueriana, on διαδικασία, 58.
 lexicographers, 168 f.; use of lost speeches by, 222 f.
 liability, pecuniary, of citizens, 110; of lodgers, 251; of sureties, 249; personal and predial, 254 n¹.
 liberty and democracy, 16.
 for a slave, claim of, 193.
 limit of a city, 2.
 limitation of actions, 214 ff.
 line of action, determination of, 146.
 λιποναντίου and λιποστρατίου γραφαί, 169.
 λιποταξίας γραφή, 62, 169.
 Lipsius, on ἀμφισβητεῖν, 221 n¹.
 on choice of tribunal, 178.
 on γραφή τοῦ μὴ ἐπιτηδείου νόμου, 171.
 on οὐσίας δίκη, 225 n.
 controversy of, with Rabel, 60 n.
 literal contract, 239 ff.
 loan to Arkesine, 81, 108.
 loan by means of ἔρνος, 121 f., 232.
 loans, city representation for, 108 f.; non-payment of, 245 f.; sureties in, 249.
 loans, for corn trade, 78, 222.
 loans, as property, 199.
 local custom in transactions, 232; judges, 148.
locatio conductio, 256.
 Lochites, Isokrates against, 176.
 lodgers, liability of, 251.
 Logic, rejection of, by Sophists, 28.
 λογισταί, 141, 168.
 λόγῳ and ἀριθμῶ, 56.
 Lokrian cities of Chaleion and Oiantheia, 155.
 Lokrians, Epiknemidian, at Nau-paktos, 203.
 Epizephyrian, 228.
 long user, 216.
 lot, election by, 140.
 lots, distribution of, as basis of property, 198.
 λύσις, 252.
 Lykophron and nobility of birth, 28.
 Lykurgos, speeches of, against Leokrates, 12 n¹.
 on elements of an action, 116.
 on oath of allegiance, 98 f.
 Lykurgos, law-giver, distribution of holdings by, 9.
 Lysias on conditions of arrest, 186.
 on corn law, 114.
 on death of Eratosthenes, 175.
 on destitute citizen, 54.
 on δίκη ἐνοικίου, 224 ff.
 on δοκιμασία, 53, 141.
 on law of treason, 170; on μεσεγγυή, 250; on rape, 193.
 on unjust claim of State funds, 110.
 on wounding to kill, 182 f.
 lost speeches of, 222.
 Lysimachos, case of, 63, 114.
 Magistrate, ἀνάκρισις of, 50, 145; order of, execution on, 219.
 magistrates, examination of, 168; help of, in execution for debt, 248; position of, in Greece and Rome, 113 f., 128; preliminary investigation of, 50, 145; representation of city by, 109; of phratries and demes, 124, 248.
 Magnesia and Smyrna, union of, 118.
 maiming, 47.
 μάδραγ, 236.
 Makartatos, speech against, 59, 91 f., 221.
 Makedonian kings, legislative reform under, 135.
 male heirs, absence of, 220.

- malicious prosecution, action for, 172.
- mancipatio*, 232; — *fiduciae causa*, 252.
- manslaughter, juridical treatment of, 47, 167, 177 ff.
- Drakonian rules of, 90, 177.
- those convicted of, 188.
- Mantitheos, case of, 195.
- manumission inscriptions at Delphi, 156, 262.
- manus injectio*, 59, 232, 246.
- Marcian, 255.
- marriage, 236; Brahmanic, 233; of cousins, 22; of heiresses, 93, 209, 212.
- Massaliote ship and trader, 158.
- material and moral damage, 48.
- materials bearing on legal institutions, 10.
- matriarchal ideas in *Oresteia*, 23.
- μη ἐκ προνοίας*, 90, 182 f.
- μη ἐπιτήδειος νόμος*, 171.
- μέχρι ἀνεψιῶδων*, 93.
- Medeia* of Euripides, 23.
- mediaeval legal practice, 231.
- medicinal drink, poison as, 182.
- Megakles, wedding of, 236.
- Meidias, case of, 50, 61 f., 149 f., 166, 174.
- Melanippos, substitution of, for Adrastus, 97.
- Melos, fate of, 163.
- Memorabilia* of Xenophon, 30, 41.
- Menippos, complaint of, against Evander, 50 f.
- mens rea*, 182 ff.
- μήνσις*, 148.
- μισεγγνή, μισέγγνος*, 250.
- Messenian territory claimed by Sparta, 213.
- métayage*, 259.
- Meter in Athens, worship of, 124.
- μέτοικοι*, loan by, 78.
- position of, 95, 99, 201.
- middleman, in transfer of property, 250.
- military clubs of Dorians, 8.
- military offences, 169.
- socialism of Sparta, 15.
- Miltiades, trial of, 151, 171.
- mines, exploitation of, 168.
- minor cases, settlement of, 149.
- minors, wrongs to, 77.
- Minos*, Platonic dialogue, 21.
- Minyon and Gorgos, grant of Samian citizenship to, 86.
- miscreants, 186 f., 190.
- μισθοφορία*, 77.
- Mithridates, the war against, 204.
- Mitteis, doctrine of, on conventions, 241 f.
- mnemones*, 204, 260.
- mobilization of landed property, 210.
- μοιχάγρια*, 248.
- μοιχείας γραφή*, 174 f.
- Molossos, satrap of Asia Minor, 204.
- monarchical principle, its effect on law, 8.
- money as property, 200, 202.
- money-lenders, 79.
- monogamy, 6.
- Montesquieu, *Esprit des Lois*, 10.
- on three factors of political life, 128.
- “monthly trials”, 146, 245.
- moral and legal duties, 38.
- moral persons, 121 ff.
- moral responsibility for crime, 184.
- moral restraint, 163.
- mortgage, estate in, 200; origin of law of, 252 ff.
- mortgagee, execution by, 219, 245 f.; right of, 251.
- mortgages, 204 f., 250 ff.
- mother, claim of, to succession, 80, 146.
- municipal courts and intermunicipal justice, 161.
- law of Alexandria, 5.
- murder, as private wrong, 47, 58, 167.

- murder and manslaughter, borderland between, 183.
 treatment of, 177 ff.
- murderers, 188.
- Muses, shrine of, 123.
- mutual consent in conventions, 231 f.
- Mykenai, 209.
- Mylasa, 204, 218.
- Mysteries*, speech of Andokides on, 72, 84, 170 n¹, 189.
- Mytilene, fate of, 163.
- Name, action about, 195, 222.
 "nation", application of term to Greek States, 96.
- national games of Greece, 154.
- natural obligations, 231.
- naturalization, 95, 117.
- nature, law of, 40.
- Naukratis, 3 f.
- Naupaktos, Lokrians at, 203.
- Nausimachos, charge of Pantaïnetos against, 194.
ναῦται, 120.
ναντοδίκαί, 161.
- navigation customs, 161.
- Naxos, mortgage at, 254; treaty of, with Arkesine, 247.
- negligence and accident, delimitation of, 183.
 —, contributory, 183.
- neaxum*, 232, 245, 254.
- Nietzsche, 34.
- Nikarete, loan made by, 109, 242 f., 247.
- Nikokles of Salamis, 8.
νόμιμα, τὰ, 77.
νόμιμον, Aristotelian use of, 44.
 — and *νομίζειν*, 19.
- νομογράφοι*, 136.
- νόμοι*, of corporations, 125.
 —, jurors' judgement of, 44.
- νομοφύλακες*, 137.
- νομοφυλακία*, 136 f.
- νόμος* as source of law, 72 f.
 definition of, 18 f., 129, 230.
 — and *φύσις*, 26 f.
 — *ἄγραφος*, *γεγραμμένος*, 42 n.
- νόμος ἐπ' ἀνδρί*, 131, 138.
 — *κοινός* and *νόμοι ἴδιοι*, 41.
 — *μὴ ἐπιτήδειος*, 171.
 — of treason, 152.
- νομοθεσία*, 80, 99, 131, 133 f.
- νομοθέται*, 134 f.
 —, oath of, 135.
- νομοθέτης*, 74.
- non-actionable transactions, 232.
- Norman lawyers and interdict, 227.
- nude pacts, 231.
- Oath, of allegiance to State, 98 f.
 in confirmation of treaties, 107 f., 162.
 in contract, 257, 261.
 of corporation, 125.
 of Council, 115.
 of ephebes, &c., 99.
 of *Heliasts* (*dikasts*), 68, 99, 143, 205.
 of judges (*Labyadae*), 88.
 of magistrates, 99, 115.
 of *νομοθέται*, 135.
 evidence on, right of giving, 189.
 legislation under, 99.
 the quintuple, 156.
 as ritual, 233.
- oaths on hill of Ares, 185.
- obligation, public, 162.
- obligations, enforcement of, 245 ff.
- obligations, *ex contractu* and *ex delicto*, 230; hypothecary, 219.
- occupation as basis of ownership, 197 f., 212 f., 216, 218.
- occupier, claim of rent from, 224.
- Odyssey*, convention in, 234 ff., 248.
- offences, classification of, 173 ff.
- offerings, marriage, birth, &c., 88.
- offices (public), 52 f.
- officials, actions against, 167 f.

- officials, executive, position of, at Athens, 140 f.
 supervising registration of sale, 260.
 witnessing, 198, 204.
- Oiantheia and Chaleion, 155 f.
οικιστής, 202.
οἶκος and *κλήρος*, 91 f.
οἶκον ὀρφανικοῦ κάκωσις, 173.
- Old English wedding, 236.
- oligarchical confederation of Boiotia, 159 f.
- olive trees, 218.
- Olymos, 218.
- Olympia, inscription of, 82 f.
 Olympian Zeus, 162.
- Olympiodoros, convention of, 238; speech against, 221, 224.
- Onetor, property of, 200.
- openly acknowledged property, 202.
- ὀφειλόμενον*, 39.
- orator, responsibility of, 132 f.
- Orchomenos, loan to, 109, 242 f., 246 f.
- order of magistrate, execution on, 219.
- ordinary crimes, 174.
- Oresteia* of Aischylos, 22 f., 185.
- "organic", application of term to State, 96.
- organic continuity of national life, 105.
- organization of associations, 124 f.
 of power in Greek State, 129 f.
- ὀργεῶνες*, 87, 124, 126, 178.
- ὄργια*, 87.
- origins of *ὑποθήκη* and mortgage, 252 ff.; of ownership, 197, 206 f.
- ornamental objects as property for partition, 208.
- orphans, obligation of guardians of, 251.
 wrongs to, 77.
- ὀρφανῶν κάκωσις*, 173.
- ostracism, 84, 130 f., 139.
οὐσία, 198 f.; *ἀφανής* and *φανερὰ*, 202.
οὐσίας δίκη, 199, 223 f.
- outlaw, murderer as, 180.
- outlaws, arrest of, 187.
- ownership, creation of, 197, 206 f., 213; retention of, by debtor, 251.
 —, public element in, 212.
 —, rights of, 224.
 — of house, 232.
- Oxylos, legislation of, 253.
- Oxyrhynchos fragment of Theopompos, 159.
- παλαιόπλουτοι*, 252 n⁴.
- Palladion, 178 f., 181, 183.
- Pallas, shrine of (= Palladion), 185.
- πάματα* = goods, 209.
- Panathenaic festival, 99.
- Pantainetos, speech against, 186, 194, 249.
- papyri, 5, 81, 242.
- παραγραφή*, 146, 215.
- παρανοίας γραφή*, 173.
- παρανόμων*, see *γραφή π.*
- παραπρεσβείας γραφή*, 168.
- pardon as bar to prosecution, 186.
- parentelae* in succession, 211.
- parents, ill-treatment of, 173.
 penalty for crimes against, 189 f.
 wrongs to, 77.
- Parliament, as channel of King's action, 69.
 — and Statutory law, 73.
- Paros, Miltiades' expedition to, 171.
- part profit, leases for, 259.
- Parthenon, 111.
- partition, 208, 211.
- partners, dishonesty of, 238.
- partnerships and companies, 120 f.
- Parts on convention of Hephaistos, 234 f.

- Pasion, banker, error of, 194.
 pasture-land, 207, 209.
paterfamilias, 200.
 πατραλοίας, as actionable term, 194.
 πάτρια, τὰ, 75.
patria potestas, 7.
 πατριάν, 88.
 patriarchal communities, 1.
 — ideas in *Oresteia*, 23.
 Patrias, a scribe, 83.
 patricians and plebeians, struggle between, 254.
 patrimony, 190, 199.
 πατριος πολιτεία, 137.
 πατῶα, 201.
 πατρωῖοι, 209.
 Patrokleides, decree of, 181.
 patrons, intervention of, 154.
ραυπέε, 233.
 payment of debt by Orchomenos to Nikarete, 109.
 payment to neighbours in sale, 260.
 of price in sale, 262.
 of rent, 224.
 payments to citizens, 54.
 peásant and trader in Greece, 212 f.
 Peiraieus, deme of, 87, 125.
 Peisistratos, 77, 148.
 Peisitheides, decree in favour of, 134.
 Peloponnesian war, Athenian funds for, 111, 111 n.
 Peloponnesos, 2.
 penal actions, 165 ff.
 penalties of *δαιτηγαί*, 147.
 of magistrates, 115.
 penalty in *προβολή*, 48, 150.
penestae of Thessaly, 210, 259.
 penestae for Athenian citizen, 54.
πεντακοσιομέδιμνοι, 254.
 People, functions of the, 73, 128 ff.
 and responsibility of orators, 132 f.
 See also Demos.
 perfumery shop, sale of, 263.
 Perikles, charges against, 132, 168.
 colonies in time of, 203.
 his definition of law in *Memorabilia*, 30 f.
 funeral oration of, 6.
 law of, on citizenship, 89, 94.
 reforms of, 167.
 Perikles as *στρατηγὸς αὐτοκράτωρ*, 140.
 Persian wars, economic effect of, 211.
persona ficta, 162.
 personal arrest and imprisonment, 245 f.
 dignity, Greek sense of, 163.
 factor, in obligations from delicts, 47 f.
 liability, 254 n¹.
 motives in speeches, 138.
 property, 199.
 values in distributive justice, 47 f.
 personality as standard in conflict of laws, 157.
 legal or juridical, 103.
 personification of the city, forms of, 101.
 persons, law of, 57.
 persons of debtors, 245.
 petty remedies, 227.
 Phainippos, case of, 55.
φανερὰ οὐσία, 199, 202.
 Phaselis and Athens, treaty of, 157.
φάσις, 148.
φατρίαν, 88.
 Pheidias, art of, 154.
φέρειν, 154.
φιλανθρωπία of the Athenian, 65.
 Philip of Makedon and legislative reforms, 135.
 Philippion assignment to Courts, 178 n³; on case of Zenothemis, 227 n².
 Philochoros, 55 n.
 on *νομοφύλακες*, 137.

- Philokrates, accusation of, by Hypereides, 169.
- Philothea, case of, 261.
- Phoinissai* of Euripides, 24.
- Phoinix of Thera, shrine in memory of, 123.
- φονικὰ δίκαι, 177.
- φόνος ἀκούσιος, 177 ff., 182.
— ἐκούσιος, 179, 182.
- φωρά, 176.
- φόροι, 112.
- φράτορες, 120.
- phratriarch, 89, 124.
- phratries, 85, 121, 124.
- phratry, constitution of, 86 f.
duty of, in homicide, 178.
- φρόνησις, τὸ φρονεῖν, 41.
- Phrynichos, reference to, of Harpokration, 226.
slayer of, 95.
- φύσις and νόμος, 26 f., 40.
- phylae, 85.
- ρῆγορις καρῖο*, 59, 246.
- ρῆγυις*, 250, 254.
- Plato, caricatures of, 29.
condemnation of juries by, 11.
on αἰδώς and ἀναισχυντία, 33.
on consent in convention, 239.
on continuity of Athenian State, 104.
on credit sales, 231, 263.
on cult of Hestia, 100.
on damages, 195.
on death from blows, 183.
and death penalty, 188.
on Dorian customs, 8.
on δόξα τῆς πόλεως, 38.
on duties to State, 39 f.
on education of citizen, 16.
on equity, 64.
on jurisprudence and justice, 38.
on land law, 9.
on numbers in State, 85 f.
on religious obligation, 98.
on the sophistic doctrine, 25.
on tribal lordships, 1.
- Platonic classes in the State, 39.
- Platonic dialogue of *Minos* on custom, 21.
“ideas”, 41.
plea of self-defence, 186.
pleas of land, 214.
“plebeians” in phratry, 86.
πλῆθος = complex of citizens, 113.
πλωτῆρες, 119.
plots (of land) with slaves, 200.
- Plutarch, on accusation of Perikles, 132.
on colonies in time of Perikles, 203.
on procedure against homicides, 177.
on Solon’s law of abuse, 194.
- ποινή, 188.
- poisoning, 47, 167, 181 f., 184.
- Poland on associations, 123, 126 f.
- πολιανομοὶ*, 218.
- police, interference of, 147.
- policy of tyrants at Athens, 148 f.
- polis, the Greek, 2, 12 ff.
— execution on, 108.
— as moral personality, 104.
- πόλις ἐκκλητος, 160.
- πολιτεία, relation of, to the State, 98, 106.
— = citizenship, 117 f.
- political accusation, 166. *See also* προβολή.
- political allegiance of colony to mother city, 158.
crimes, 169 f.
education, Protagoras on, 188.
privileges, loss of, 189 f.
psychology of Protagoras, 31 f.
trial, 62, *see also* εἰσαγγελία.
- Politics*, 97, 105 f., 129 f., 143 f., 212, *and see* Aristotle.
- πολιτικὸν δίκαιον, 44.
- pollution, 75, 185.
- πολύκληροὶ, 254.
- Polybios, on case of seizure, 228.

- Polyeuktos, accuser of Euxenippos, 169.
 Poseidon, convention of, in Homer, 234, 237, 248.
 Poseidonios, *θάλασος* of, 122.
 position of magistrates, 113 f.
 positive law, justification of, by Protagoras, 32.
 legality in justice, 19.
 possession, juridical value of, 227.
 protection of, 60.
 recovery of, 223 f.
 rights of, 58.
 security of, 226.
 warrant of, by lessor, 258.
 — of bath-house, 227.
 of things withheld, 226.
 — and property in gage, 250.
 and title, law of, 59 f.
 uncontested, 222.
 possessory remedies, 227.
 posthumously adopted son, claim of kinship against, 59.
 Praetorian law, development of, 59.
 Pragmatism, 34.
πρᾶσις ἐπὶ λύσει, 250 ff., 261.
πράτωρ, 261 f.
πρᾶξις, 125, 246, 248.
 Praxiteles, 154.
 precedents in Greek law, 78 f.
 prejudice in law, 12.
 prejudicial proceedings, 171, 174.
 declarations of right, 192.
 settlement, 145 f.
 trial, 133.
 verdict, 63.
 See also διαδικασία and προβολή.
 predial liability, 254 n¹.
 servitude, 253 f.
 preliminary investigation by magistrates, 50, 145 f., 179.
 steps of trial, 145.
 premium for information, 222.
 preparatory action in judicial procedure, 145.
 prescription, 213 f.
 preservation of laws, 136.
 presiding magistrates, *ἀνάκτισις* of, 50, 145 f., 179.
 Priamos, visit of, to Achilles, 163.
 price, payment of, in sale, 263.
 receipt of, 231.
 prices, regulation of, in Greece, 70.
 pride of race, 164.
 Priene, inscriptions of, 83.
 priestess, refusal of, to perform sacrifice, 226.
 priestess of Athene, warning of to Kleomenes, 97.
 priesthood, claimants to, 222.
 priests and priestesses in organization of phratries and demes, 124.
 primitive collectivism, 206.
 principals and accomplices, distinction between, 184.
 principles of law and equity, 161.
 of Greek public law, 102.
 private accusation for public wrongs, 61.
 agreements and public rules, 230.
 appropriation, 212 ff.
 citizens, right of, to prosecute magistrates, 115.
 cults, privileges of, 9.
 debts, cancellation of, 205.
 enterprise, 212 f.
 force, justification of, 187;
 production of ownership by, 197.
 international law of Greece, 158.
 ownership, origin of, 197, 206 f.
 prosecution, 165.
 violence and public danger, 186 f.
 will, assertion of, 198.
 wrongs, 47; legal redress of, 191 ff.

- privateering, 120.
 privileges, grant of, 95, 134.
 of citizenship, 53, 113 f., 117.
 of individuals, 139.
 political, loss of, 198 f.
προαγωγή, 174.
Proastriæ of Phrynichos, 226.
 probate, disinclination to grant,
 79.
probatio diabolica, 198.
Problemata of Aristotle, 67.
προβολή, 51, 63, 133, 149 f.,
 166, 171, 174.
προβούλευμα of the Council,
 132, 142 f.
 procedural limitations, object of,
 216.
 procedure in *δίκαί ἐμπορικαί*,
 161 n.
 in *εἰσαγγελία*, 151, 169.
 in *ἐνδειξις*, 187.
 in grants of citizenship, 131.
 in heliastic tribunal, limita-
 tion of, 147.
 in iudicio and *in jure*, 145.
 in law, tradition in, 77.
 in legislation, 133 ff.
 in *προβολή*, 149 f.
 in public affairs, place of re-
 ligion in, 98 f.
 in sale, 260 ff.
 proceeds, attribution of, 209.
 proclamation of sales, 255, 260.
 procuration (procuring), 47,
 174.
procureur, 165.
προδοσία, 169.
 products of labour, recovery of,
 226.
προεδρική γραφή, 168.
πρόεδρος, 134, 168.
 prohibition of alienation by
 lessor, 258.
 of export, 153.
 to legislate, 131.
 as to offerings, 88.
προκαταβολή, 221.
 Prometheus, 32.
 promises, *ἐγγύαι*, 234 f.
πρόνοια, 182 ff.
 proofs of agreements, 239 f.,
 257 f.
 property, acquisition of, from the
 city, 205.
 confiscation of, *see* confisca-
 tion.
 deprivation of, 193.
 derivation of, 59.
 distribution of, 51.
 elements of, 197 ff.
 exchange of, 55.
 Greek doctrine of, 228.
 juridical theory of, 199 f.
 kinds of, 199 f.
 natural source of, 213.
 pledging of, for dowry, 219.
 protection of, 57.
 recovery of, 223 f.
 rights of, assertion of, 58,
 223.
 squandering of, action for,
 173.
 of debtors, 245.
 family, 91.
 in land, Solonian law of, 52.
 of temples, 205 f.
 — and possession in gage,
 250.
 proportion, principle of, and τὸ
 ἀντιπεπονηθός, 70.
 proportionate standards, 56.
 Propylæa, 111.
 proscription of individual, 139.
 prosecution of magistrates, 115.
 — by kinsmen, 76, 90. *See*
 also homicide.
 for religious offences, 100.
προστήμῃσις, 51, 150.
 prostitution, 172, 189.
 Protagoras, penal doctrine of,
 35, 188.
 political psychology of, 31 f.
 relativism of, 27.
 protection of possession, 60.
 of property, 57.
 of refugees, 163.
 protectionist measures, 153.
προθεσμία, 214 ff., 229.

- Protos, case of, 222.
 proposal of, 213 n³.
 provisional possession, 250.
 protracted possession, 214 ff.
προξενία, 95.
 Prytaneion, 98, 100.
 Prytaneis, 132.
 Prytanies, rules as to assemblies
 in, 133.
 Pseudo-Asconius on written in-
 struments, 240 f., 244.
ψευδοκλητείας δίκη, 196.
ψευδομαρτυριῶν, actions, 196.
 pseudo - Xenophon, *Athenian*
 Constitution of, 10.
ψιλὴ γῆ, 217 f.
ψήφισμα ἐπ' ἀνδρί, 131.
 — and νόμος, 74.
ψηφίσματα, νόμοι and *θεσμοί*,
 129.
 — of corporations, 125.
 psychological element in crime,
 182.
 suggestions, influence of, in
 Courts, 67.
 unity of City, 96 f.
 psychology of the Greek race, 6.
 public assistance for Athenian
 citizen, 54.
 burdens, *see λειτουργίαι*.
 danger from private violence,
 186 f.
 debtors, ἀτιμία of, 189, 205.
 debtors, inscription on roll of,
 222, *and see* State debtors.
 debts, cancellation of, 204.
 duty, διαδικασία about, 222.
 See also λειτουργίαι.
 element in property, 198 f.,
 202 ff., 212.
 executioner, 180.
 public force producing owner-
 ship, 197.
 public force to right private
 wrongs, 192.
 public inscription of tenure,
 198.
 law, 57.
 notaries, 204.
 public obligation, guarantee of
 fulfilment of, 162.
 opinion in Athenian courts,
 11, 66, 144.
 opinion in convention, 265.
 places, crimes in, 176, 196.
 prosecutions by individuals,
 220.
 prosecutor, 165.
 purse, method of filling by
 confiscation, 9, 191.
 rights, defence of, by private
 accusation, 61 f.
 safety, considerations of, 187,
 228.
 supervision of conventions,
 160; of κληῆρος, 211 f.
 wrongs, 47, 61 f.
 publicity in contracts, conven-
 tions, and sales, 237, 258 ff.
 punishment, Greek views of,
 188 ff.
 infliction of, by phratry, 88.
 Protagoras' doctrine of, 35,
 188.
 corporal, 191.
 punishments apart from com-
 pensation, 58.
 purchase, derivation of property
 from, 59.
 purchaser, right of, to free dis-
 posal, 251.
 purification, rites of, 75, 101.
πυρκαϊά, 182.
 purity of descent, 93 f.
 Pyrrhos the Eteobutad, 188.
 Pyrrhos, succession of, 214.
Πυθόχρηστοι, 76.
 Pythagorean conception of jus-
 tice, 70.
 doctrine of retribution, 45.
 Pythagoreans, union of, 127.

querela inofficiosi testamenti, 79.
 quintuple oath, 156.

 Rabel, controversy of, with Lip-
 sius, 60 n.

- race, community of, 96.
 pride of, 164.
 racial characteristics of Greek cities, 7f.
 rack rents, leases at, 259.
 ransom by *ἔρανος*, 121.
 of the wealthy as democratic policy, 111.
 rape, 47, 58, 175, 192 f.
ratio decidendi, 78.
 real estate, securities based on, 255.
 — property, 199 f.
 reality of social combinations, 120.
 "reception" of Attic law, 159.
 reciprocity in administration of justice, 4.
 recognizances in stone in Attika, 210.
 recovery of rent, possession, and property, 223 f.; of products of labour, 226; of slaves, 226.
 redemption of estates, 252.
 redemption instruments, 261.
 re-division of land, 205.
 redress, 46 f.
 of public wrongs, 165.
 refusal of priestess to perform rites, 226.
 register of sales, 261.
Register of Mykonos, 254 f. n.
 of *Tenos*, 204, 261.
 registration of documents of land tenure, 204, 216, 222.
 of contracts, 237, 239.
 of dowers, 237, 255.
 of fiduciary sales, 255.
 of leases and sales, 260.
rei vindicatio, 58, 199.
Reichsrecht und Volksrecht, 242.
 relations between cities, 153 ff.
 relative (comparative) property rights, 198, 221.
 relatives, claim of, to property, 79.
 relatives, prosecution by, 76,
 See also homicide.
 relativism, 27 f., 32.
 religion, city, 96.
 religion, offences against, 173.
 religion and public procedure, 98 f.
 religious authority of Delphi, 163
 circles, 124.
 corporations, 122 f.
 doctrine at Athens, 99.
 duties of citizens, 98 f.
 element in land tenure, 206 f.
 life of Greeks, international, 154.
 obligation in Plato's *Euthyphron*, 98.
 rites, performance of, 226.
 sanction of treaties, &c., 162.
 teaching, 100.
 remedies in land law, 218 ff.
 possessory and petitory, 227.
 remission of debt, 210.
 rents, recovery of, 223 f.
 renunciation of agreement, consequences of, 263.
 by Athens, of rights in allied States, 159.
 "renunciations", 231.
 representation of the city for loans, 108 f.
 for treaties, 107 f.
 reprisals, right of, 154.
Republic of Plato, 28, 39 f.
 repudiation of debts, 205.
 requirements of substance, 237 f.
 residuary justice of the Athenian People, 69.
 responsibility for acts of slave, 195.
 for laws, 170 f.
 for legislation, 132 f.
Respublica Atheniensium, 10, 191 n³.
 restriction of abuse, 194.
 retail trade, Greek view of, 96.
 Retaliation, 69 f.
 Retribution, 69 f.
 retroactive law, prohibition of, 140.

- revision of citizen lists, 55, 89.
 of laws, 73.
 general, 153 f.
Rhetoric of Aristotle, 62, 64 f.,
 71, 183, 230.
Rhetoric, substitution of, for
 logic, 28.
 — and dialectics, 37.
 Rhodos, 81 f.
 right, better, comparative, or re-
 lative, 198, 220 f.
 — of political accusation, im-
 portance of, 116.
 rights, loss of, 189.
 of possession, 58, 217, 224 ff.,
 227.
 of property, 58, 197.
 — and duties, 52; in Platonic
 State, 39.
 and remedies in land law,
 218 ff.
 road, slaying on the, 183.
 robbery, action for, 166.
 Roman *actio iudicati*, 226.
 agriculturalist and Greek
 trader, 212.
 appeal to the People, 114.
 citizenship, grant of, to pro-
 vinces, 241.
 Empire, citizenship in, 95.
 epoch, documents of, 240.
 Roman law, damage in, 194.
 familia pecuniarum in, 200.
 heredes sui in, 219.
 intention and consent in, 234.
 noxum in, 245.
 pignus in, 250, 254.
 recognition of long user in,
 216.
 treatment of property in, 197 f.
 treatment of wills in, 79; of
 succession in, 80.
 usucapion in, 213.
 of mortgage, influence of
 Greek custom on, 255.
 Roman legal notions contrasted
 with Greek, 7.
 procedure of adoption and
 testament, 237.
 Roman procedure by interdict,
 227.
 tendency to formalism, 232.
 verbal contract, 238, 241.
 vindex, 156.
 Rome, *iudex* at, 145.
 jus civile of, 2.
 rowing in the fleet, 95.
 rule of law, 113 ff.
 — as to exception and pre-
 scription, 215 f.
 rules as to cultivation (in lease-
 hold), 258.
 as to descent, 93.
 of evidence, 145.
 and requirements of lease, 257.
 rural exploitation, system of, in
 Gortyn Code, 209.
 Sacerdotal office, claims to, 222.
 sacral institutions and tradi-
 tionary law, 75.
 — regulation of phratry, 89.
 sacrifices, associations for, 120.
 refusal to perform, 226.
 sacrilege, 173.
 sailors, 120.
 — on neutral ships, slaughter
 of, 163.
 sale, conclusion of, 262.
 law of, 256 ff.
 prevalence of over lease, 258.
 (*πρᾶσις ἐπὶ λύσει*) conditioned
 by possible repayment,
 250 ff.
 in establishing title, 213.
 after confiscation, 209 f.
 for inheritance, 208, 211.
 Salic law, *affatomia* in, 232.
 Salomon on νόμος, 42 n.
 Samos, formation of Athenian
 commonwealth at, 107.
 Hera at, 97.
 inscription of, 85 f.
 sanction, quasi-religious, 233.
 sanctions in treaties and agree-
 ments, 161 ff.
 Saturnalia, 99.
 Scandinavian *máldagi*, 236.

- schematic arrangement of tribes, &c., 86.
- Schömann on religious doctrine of the Athenians, 99.
- scribes, influence of, on law, 82 f.
- scrutiny of officials, 140.
- search, right of, 176.
- Second Athenian League, Council and methods of, 159.
- Statute of, 189.
- Second Chamber, *νομοθέται* as, 134.
- security, for city loans, 108 f.
- for private contracts, 250.
- of possession, 226.
- securities in land, 255.
- secret ballot, 90.
- σεωάχθεια*, 204, 252.
- "seisin" by sons, 219.
- seizure by self-help, 219 f.
- of goods for debt, 246 f.
- of subjects of litigation, 227 f.
- self-acquired property, 199, 201 f.
- self-consciousness, 33.
- self-defence, 182, 227.
- self-evident claims, 218.
- self-help in business agreement, 81, 246.
- in case of adultery, 175.
- against criminals, 147, 186 f.
- in international cases, 154 ff.
- in land law, 218 ff.
- restriction of, 59, 227.
- Selymbria, treaty between Athens and, 107.
- sentimentalism in law, 12.
- separation of functions, 143.
- serfs, 208.
- service, contract of, 46.
- sheep as property for partition, 208 f.
- shield of Achilles, 89.
- ship, provisional sale of, 250 f.
- seizure of, by *ἐμβάτευσις*, 219.
- shipping partnership, 119.
- shipwreck, law of, 82.
- shrines, connected with trials, 185.
- Siphnos in Keos, 5.
- slander, 47.
- slaughter in war, 163.
- slave, deposition of, 249.
- slaves, claim of liberty for, 193.
- slaves, claim to possession of, 228; to recovery of, 225.
- damage by, action for, 194 f.
- denunciation by, 148.
- ἵβρις* against, 175.
- participation of, in Kronia, 99.
- in circle of citizenship, 94.
- in religious societies, 126.
- as property, 199 f.
- slavery, sale into, 94, 191, 245.
- and law of nature, 28.
- slaying on the road, 183.
- sloth, action for, 173.
- Smith, J. A., 129 n.
- on *ἐγγύη*, 233 n¹.
- Smyrna and Magnesia, union of, 118.
- social contract, 36 f.
- and private agreements, 231.
- social groups, 85 f., 96.
- responsibility for punishment, 188.
- type as basis of legal system, 197.
- unrest in Greece, 21 f.
- Socialism, 15 f.
- societas*, 127.
- societies and unions, 119 ff.
- Sokrates, 35 ff.
- action of, in trial of generals, 151.
- doctrines of, 36 ff., 41.
- intellectualism of, 37 f., 41.
- Plato's defence of, 98.
- prosecution of, 36, 100, 173.
- soldiers of fortune, 119.
- solemn words in law, 232 f.
- solidarity between kinsmen, 235.
- Solon, *ἄξιοι* of, 5, 120.
- constitution of, 137.
- his gift of the right of litigation, 116.
- intention of, as to Council, 143.

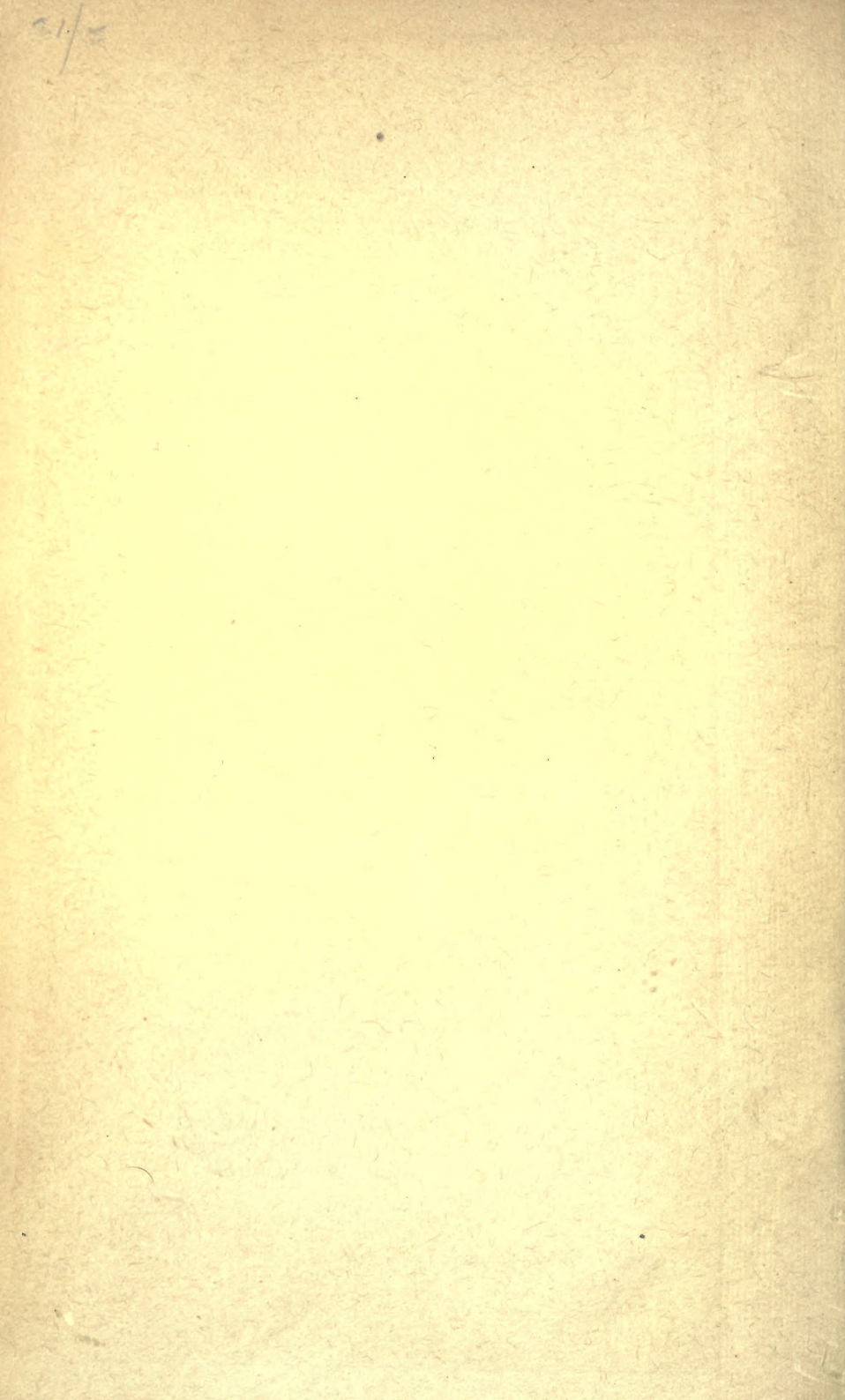
- Solon, law of, about abuse, 194.
 about damage by animals, 195.
 about property in land, 52, 212.
 about societies, 87, 120 f., 125.
 about wills, 66 f., 263.
 legislation of, concerning debt, 204 f.; concerning land, 210 ff., 245, 252 ff.
 Plutarch's life of, 177.
 as dictatorial legislator, 135.
 as *νομοθέτης*, 74.
- Solon's *Elegy*, 129 n.
- σώματα* as opposed to goods, 189.
- sons, inheritance of, 208.
- Sophistic views in Euripides' plays, 25.
- Sophists, the, 25 ff.
- sophistry in law, 12.
- Sophokles, his idea of *fate*, 23.
 on law of nature and the State, 25.
- sound mind in consent to convention, 263; in wills, 212.
- source of law, 72.
 law of nature as, 42.
- sovereign Demos, intervention of, 152.
 power and force of law, 31.
 sovereignty, legal basis of, 28 f.
- Sparta, *ἀρχαῖαι μοῖραι* of, 203.
 claim of, to Messenian land, 213.
 common meals at, 8.
 equality of holdings at, 9.
 military clubs at, 8.
 socialism of, 15.
 and Argos, treaty between, 157.
 as a "nation", 96.
- Spartan institutions, 8 f.
- Spartans, complaint of Kerkyraians against, 160.
- special courts at Athens, 167.
- specific rights, loss of, 189.
- speeches of orators, evidence of, 144.
- spendthrifts, action against, 201.
- Speusippos and Leogoras, case of, 84.
- Sponsalia*, 235.
- sponsio*, 232, 235.
- sponsor*, 235.
- squandering of property, 173, 190.
- standard of justice, 44 f.
- standard of truth in Gorgias' philosophy, 28.
 in Protagoras' philosophy, 34.
- standard of utility, 34.
- standards of income, 253; of value in distribution, 52 f.; in price of persons, 193.
- standing committee of Assembly, Council as, 143.
- State colonization, economic effect of, 211.
 debtors, 110, 187.
And see public debtors.
 domains and temple property, 205.
 morality and expediency, 58.
 religion, idea of, 106.
 slaves, 82.
 trials, 149 ff., 187.
- , the, eminent domain of, 203.
 functions of, 128 ff.
 judicial monopoly of, 59.
 juridical nature of, 97 f., 103 f.
 non-interference of, in affairs of corporations, 125.
 right of, to set up legal standards, 38.
 three elements of, 128 f.,
 — and the individual, 15 f., 102 f.
 as an educational institution, 16.
- States, development of, from villages, 2.
 isolation of, 20, 153.
- Statute of Limitations, 215 f.
- Statutory law, 72 f.
- stepmother, poisoning by, 184.
- stick, throwing of, as symbol of possession, 232.

- stipulatio*, 232, 238, 241.
 Stobaeus, quotation of Theophrastus by, 259.
 stock and farm leases, 259.
 Stoicism, 42.
 stone as cause of death, 185.
 recognizances in, in Attika, 210, 252.
 strangers as citizens, 94.
στρατηγία, iteration of, 140.
στρατηγοί, power of, to summon Assembly, 132.
στρατηγὸς αὐτοκράτωρ, 140.
 Stratokles, speech against, 225.
 subjective element in Athenian Courts, 65 f.
 subjectivism in Sophists, 28.
 substance, requirements of, 237 f.
 succession, law of, 4, 206 ff.
 in Attika, 211 f.
suggestio falsi, 238.
συκοφάνται, 115, 149, 152, 169, 172.
συκοφαντία, 61.
συκοφαντίας γραφή, 172.
συλᾶν, 154, 246.
σύμβολα 4, 157.
συμβόλων, *δίκαι ἀπὸ*, 161.
 summary actions for recovery of land, 217.
 — execution, 81.
 — jurisdiction, 148.
 — procedure, 122, 147 f.
συμφέροντα, τὰ, 239.
συμπολιτεία, 117 f.
συνάλλαγμα, 238.
συναλλάγματα, 46 f., 230.
συνήγοροι of laws, 133.
 of magistrates, 146.
 of phratry, 89.
συνήγορος representing the people, 150.
συγγραφαί, 240 ff.
συγγραφή, 238 ff.
συνοικισμός of Attika, 100.
 — of Smyrna and Magnesia, 118.
 — of Teos and Lebedos, 136.
συνθήκαι, 244.
συνθήκη, 238.
 —, *νόμος* as, 18, 230.
συνθηκῶν παραβίασεως δίκη, 256.
 supervision of administration by Council, 142.
 supplementary judicial measures, 147 ff.
Supplices of Aischylos, 22 f.
 of Euripides, 73.
suppressio veri, 238.
 supremacy of State law, 37.
 Supreme Court of U.S.A., 136.
 sureties, 234 f., 248 ff., 262.
 imprisonment of, 246.
 for bail, 187.
 surety (*ἐγγύη*), 234 ff.
 suretyship, 249.
 contract of, 243.
 surplus value, compensation for, 251.
σύσσιτοι, 120.
sykophants, *see* *συκοφάνται*.
 symbol of possession, 232.
 symbolic objects, delivery of, as pledge, 250.
 symbolization of civic public, 237.
syngrapha, *see* *συγγραφή*.
synoikismos, *see* *συνοικισμός*.
 Syrakuse, 158.
 Szanto on hypothecary mortgage, 254 n¹.
 Tagoi, 88.
ταμίαι in phratries, &c., 124; of temple funds, 112 f.; *ταμίας τοῦ δήμου*, 134.
 tariff for rape, 193.
 Teians, agreement of, with Arkadians, 246.
 temple funds, borrowing of, 113.
 property, 205 f.
 robbery, 48.
 treasures, 112 f.
 temples, leases by, 217 f.
 plenipotentiaries of, 257.
 tenant right at Heraklea, 217 f.
 of *Φουκῆς*, 209.
Tenos, *Register of*, 204 n⁴, 261.

- tenure, public inscription of, 198.
of land, *see* land tenure.
Teos, 136, 156, 246.
terms for convention, 238.
testament, adoption by, 220.
testaments, fairness in dealing
with them, 66. *See also* wills.
Thalheim, view of, on *δίκη βλάβης*, 195 n.
Theaitetos of Plato, 34.
Thebes, hegemony of, in Boiotian
league, 160.
theft, 47, 58, 176, 196.
choice of action for, 167.
those convicted of, 189.
Themistokles, 101, 111, 163 n¹.
Theokrines, 172.
compromise of, 179.
Theophemos, 76.
Theophrastos, treatise of, 223.
Theophrastos on sale, 259 ff.
Theopompos, *Hellenica* of, 159.
θεωρικόν, 111 f., 142.
Thera, hypothecary mortgage at,
254.
society of Epikteta at, 122 f.
Thermopylae, 163.
Theseus, establishment of hearth
by, 100.
in *Supplikes* of Euripides, 73.
θεσμός and *νόμος*, 74, 129.
θεσμοθέται in *δίκαι ἀπὸ συμβόλων*, 161.
— and Heliastic Courts, 51,
114.
— suspension of, 142.
— title of, 129.
θεσμοθέτης, Drakon as, 74.
Thespieae, banker of, 242.
Thessaly, *penestae* of, 210.
θήτες of Attika, 210.
θίασοι, 87, 122 ff.
θίασος of Poseidonios, 122.
θιασῶται, 120.
θιασώτης and *ὄργεῶν*, 124.
thief, arrest of, 186.
treatment of, 147, 176.
things, law of, 57.
thirty *δικασταί*, 149.
thirty (*τριακάς*), 85.
Thirty, the, debts left by, 106.
downfall of, 62, 105, 107, 170.
rule of, 141.
Thisbe (in Boiotia), 218.
Tholos, 100.
Thrasymbulos of Kalydon, 95.
Thrasymachos in *Republic*, 28.
Thukydides on atrocities of war,
163.
on Boiotian league, 118 f.
on migration of tribes, 1.
on social unrest, 22.
on treaty between Sparta and
Argos, 157.
on Themistokles at hearth of
Admetos, 101, 163 n¹.
τιμαί, 51 f., 140.
Timarchos, property of, 200 f.
speech against, 190.
τίμημα, 192.
τίμησις, 49.
τιμητοὶ ἀγῶνες, 49, 191.
Timokrates, speech against, 134,
138 f., 170.
timocratic classes of Solon, 253.
constitutions, principle of jus-
tice in, 53.
government of Athens, Iso-
krates on, 56.
Timotheos, speech against, 239.
title, claims based on, 227.
derivation of, 198.
establishment of, 213, 224.
transfer of, 260 ff.
to property acquired from the
city, 205.
— and possession, 52, 227.
Tiryns, 209.
tort, actions in, 191 ff.
torts, Greek law of, 46 f.
town houses, inheritance of,
208 f.
trade customs, 158, 161.
partnerships, 119, 120.
routes, 153.
effect of Heliastic decision on,
79.
goods acquired by, 213.

- trader and peasant in Greece, 212 f.
- tradesman as term of abuse, 194.
- traditional law at Athens, 75 f.
- transactions, 230 ff.
- transfer of land, 216.
of use of houses, &c., 256.
- transformism, theory of, 27.
- τραυμάτων ἐκ προνοίας δίκη*, 182 f.
- travellers from Greece, 20.
- treason, *see* high treason.
- treasurer of Demos, 134.
- treasurers of temple funds, 112 f.
- treasuries in temples, 112 f.
- Treasury, claim against, 110.
clerks of, 142.
debt of ambassadors to, 139.
filling of, by confiscation, 205.
- treaties, city representation for, 107 f.
sanctions in, 161 f.
between Athens and Chalkis, 107.
Athens and Eretria, 107.
Athens and Phaselis, 157.
Athens and Selymbria, 107.
Elis and Heraia, 162.
Naxos and Arkesine, 247.
establishing joint citizenship, 118.
- τριακάς*, 85.
- trials in tort, 191 ff.
- tribal divisions, scheme of, 85.
institutions, effect of, on later law, 206.
- tribes, 85 f.
- Tribonian, commission of, 18 n.
- tribunals, dealing with homicide, 178 f.
—, democratic, 144.
- tribute, surplus revenue from, 112.
- trierarch, defaulting, case of a, 76.
- trierarchs, representation of city by, 107.
- trierarchy, 222. *See also* *λευτοργία*.
- truth, standard of, 34.
- Tühnen, von, on the "isolated State", 20.
- tyranny, legislation of, by decree, 130.
attempted, death penalty for, 188; trial for, 181.
— and law in *Supplices* of Euripides, 73.
- tyrants at Athens, policy of, 148.
- Ukases of a despot, 130.
- umpire, city or person, 160.
- umpires to distribute property, 51.
- uncontested possession, 222.
- undue influence in regard to wills, 67.
- unification of customs and laws, 158.
- uniformity of law in the Hellenic world, 4.
- United States of America, Common Law of, 78.
prohibition of retroactive law in, 140.
Supreme Court of, 136.
as English colony, 158.
- unity of Greek law, 3.
of the city, 96.
of the family, 93.
of political and judicial functions, 143 f.
- unpaid debts and fines, 226.
- unpremeditated homicide, 177 ff.
- unprotected transactions, 232.
- unwritten law, 73.
- "upper house", Council as, 143.
- usage, right of, 256.
- use as giving title, 216.
- use of name, claim to, 222.
- use, transfer of, 256.
- usucapion, 198, 213 f., 216.
uti possidetis, 59, 228.
- utility, standard of, 34; in treatment of contract, 239.
- utrubi*, 59.
- Value, of persons, 193.
—, standard of, in distribution, 52 f.

- "vendetta", 180.
 verbal contract, 238.
 verdict of juries, 49, 144.
 prejudicial, 63.
 villages, development of, into States, 2.
vinculum, 248.
vindex, intervention of, 156.
vindicatio rei, 199.
 vindication, action in, 220.
 of liberty of slave, 193.
 of property even after five years, 216.
 vinestocks, 218.
 Vinogradoff on Zenothemis *v.* Demon, 222 n., 227 n.
 violation of oaths, 162.
 violence, defence against, 156.
 in delicts, 47.
 virtues of heliastic courts, 12.
vis major, pleaded in excuse, 79, 258.
 voidable conventions, 237 f.
 voluntary agreements, 80; sureties in, 249.
 — associations, 119, 125.
 — jurisdiction, 80 ff.
 voting in *διαψήφισις*, 94.
 of juries, method of, 49, 144.
 Wagers in litigation, 162.
 warranty, 216.
Wasps of Aristophanes, 77.
 waste land reclaimed, 217 f.
wed, 250.
 wedding, O.E. and Greek, 236.
 welfare the aim of the State, 13 ff.
wergeld, 193.
 will, disposal by, 212.
 right to make, 66 f.
 wills, ancient rules applied to, 79; law as to, 5.
 wills, concurrence of, in agreements, 233, 237, 244, 257.
 witnesses, not really called in, 196.
 Isaios on, 66.
 in contract, 237, 239, 257.
 witnessing officials, 198, 204.
 women in religious societies, 124, 126.
 World State, building up of, 164.
 worship of men, 126.
 of female deities, 124.
 wounding to kill, 181 f.
 wrestling match, death in, 182.
 writ of execution, 81.
 writing, use of, in contract, 81, 238 ff., 242.
 written accusation, *ἐνδειξις*, 187.
 written instruments, 239 ff., 244.
 — law, 73.
 wrong (in law, not in equity), 63.
 wrongs to parents, orphans, heirs, and minors, 77.
 wrongs, public and private, 47, 165.
 Wyse on "bamboozlement" of juries, 12.
 on Greek pleadings, 12.
 sceptical conclusions of, on pleadings, 65 f.
Ξενίας γραφή, 170.
 Xenophon, on discussion of *βία* and *νόμος*, 30 f.; on doctrine of Sokrates, 41; on trial of Sokrates, 36; on trial after Arginusae, 151, 170.
 Zaleukos, law of, 228.
 Zenothemis, case of, 82, 146, 158, 213 n³, 222, 227.
ζευγῆται, 254.
 Zeus, cult of, 100.
 Olympian, 162.
 Patroos, 87.
 Phratrios, 89.
 ξένιος, 163.
ζημία, 48.
 Ziebarth, monograph of, on associations, 127.
 on dissolution of corporations, 123 n.
Zur Hand gehen, 235.



K 215 .E5 V5 1920 v.2 SMC
Vinogradoff, Paul,
Outlines of historical
jurisprudence

